Supreme Court, U. S.
FILED
SEP 5 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-350

PACIFIC LIGHTING SERVICE COMPANY and SOUTHERN CALIFORNIA GAS COMPANY,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

K. R. EDSALL,
720 West 8th Street,
Los Angeles, Calif. 90017,
General Counsel for Petitioner, Southern California Gas Company.

Of Counsel.
THOMAS D. CLARKE,
Attorney.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Statement 4

I.

Introduction 4

II.

Procedural History 5

a. Transwestern Files Curtailment Plan 5

b. Commission Issues Order Permitting Plan to Become Effective 6

c. Petitioners Seek Rehearing 6

d. Commission Denies Rehearing 8

e. Petitioners Seek Court Review 8

f. The Curtailment Plan Takes Effect 9

g. Court of Appeals Denies Petition for Review 9

Argument 10

I.

The Commission's Orders Here Under Review Violate the Petitioners' Rights Under the Administrative Procedure Act, and the Natural Gas Act 10

a. The Commission Orders Rely Exclusively Upon Order No. 467 10

Page

b. Substantial Evidence Is Essential if the Commission's Actions Are to Be Sustained on Appeal 13

c. Order No. 467 Is Not "Substantial Evidence" 15

d. Substantial Evidence Is Still the Test of the NGA Even Where Order No. 467 Is Being Applied 17

II.

The Ninth Circuit Erred in Failing to Hold the Commission to the Teachings of This Supreme Court 20

III.

The Offer of a Section 5 Hearing on a Limited Number of Issues Does Not Afford a Meaningful Hearing and Unlawfully Shifts the Burden of Proof 22

IV.

The Decision of the Ninth Circuit Permits the Commission to Avoid Its Statutory Responsibilities 24

Conclusion 28

INDEX TO APPENDICES

Page

Appendix A. Judgment, Dated April 25, 1975 ..... App. p. 1

Opinion of the United States Court of Appeals for the Ninth Circuit 2

Appendix B. Order Accepting for Filing Tendered Tariff Sheets, Establishing Procedures, and Granting Interventions. (Issued May 31, 1973) 6

Order Denying Rehearing and Reconsideration, Instituting Complaint Proceeding, and Establishing Procedures. (Issued August 1, 1973) 10

Order Denying Motion to Vacate and Set Aside Prior Order and Granting Motions for Stay of Procedural Dates. (Issued September 21, 1973) 15

Appendix C. Order 18

Appendix D. Natural Gas Act of 1938, §§4, 5, 19(b), 52 Stat. 822, 823, 831, as Amended, 15 U.S.C. §§717c, 717d, 717r(b) 19

Appendix E. Administrative Procedures Act (1967) 25

Appendix F. Order No. 467. Statement of Policy. (Issued January 8, 1973) 31

Order No. 467-A. Amendment to Statement of Policy. (Issued January 15, 1973) 38

Order No. 467-B. Order Modifying Order 467, Statement of Policy, and Order Denying Motions for Reconsideration. (Issued March 2, 1973) 42

TABLE OF AUTHORITIES CITED

Cases — Page

Cities Service Oil Company v. Dunlap, 308 U.S. 208 (1939) 22

Consolidated Edison of New York v. Federal Power Commission, 511 F.2d 372 (D.C. Cir. 1974) 18

Federal Power Commission v. Louisiana Power & Light Company, 406 U.S. 621 (1972) ..... 4 ..... 20, 21, 24

Mobil Oil Corporation v. Federal Power Commission, 483 F.2d 1238 (D.C. Cir. 1973) 13, 14

Pacific Gas and Electric Co. v. Federal Power Commission, 506 F.2d 33 (D.C. Cir. 1974) 15

Pennsylvania Gas & Water Co. v. Federal Power Commission (Penn Gas), 463 F.2d 1242 (D.C. Cir. 1972) 25

Philadelphia Co. v. Securities and Exchange Commission, 175 F.2d 808 (D.C. Cir. 1948) 22, 23

Rhode Island Consumers' Council v. Federal Power Commission, 504 F.2d 203 (D.C. Cir. 1974) 27

Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940) 22

State of Louisiana v. Federal Power Commission, 503 F.2d 844 (5th Cir. 1974) 17, 18

Statutes

Administrative Procedure Act of 1946, Sec. 551 (4) 3, 17

Administrative Procedure Act of 1946, Sec. 553 .....3, 12, 14, 15

Administrative Procedure Act of 1946, Sec. 553 (c) 17

Page

Administrative Procedure Act of 1946, Sec. 556 .....3, 15

Administrative Procedure Act of 1946, Sec. 557 .. 3

Natural Gas Act of 1938, Sec. 4 .....3, 6, 8, 10 .....19, 20, 21, 24, 25

Natural Gas Act of 1938, Sec. 5 .....3, 8, 9 .....10, 20, 23, 24

Natural Gas Act of 1938, Sec. 19 .....4, 13

Natural Gas Act of 1938, Sec. 19(b) 3, 25

52 Statutes at Large, p. 822 3

52 Statutes at Large, p. 823 3

52 Statutes at Large, p. 831 3

60 Statutes at Large, pp. 237-244 3

United States Code, Title 5, Sec. 551(4) 3

United States Code, Title 5, Sec. 553 .....3, 15

United States Code, Title 5, Sec. 556 .....3, 15

United States Code, Title 5, Sec. 557 .....3, 15

United States Code, Title 15, Sec. 379 22

United States Code, Title 15, Secs. 717-717w 11

United States Code, Title 15, Sec. 717c .....3, 7 .....8, 10, 20, 21

United States Code, Title 15, Sec. 717d .....3, 8, 9 .....10, 20, 22

United States Code, Title 15, Sec. 717r 4, 13

United States Code, Title 15, Sec. 717r(b) 3

United States Code, Title 28, Sec. 1254(1) 2

United States Constitution, Fifth Amendment 3

IN THE

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October Term, 1975
No. .....

PACIFIC LIGHTING SERVICE COMPANY and SOUTHERN CALIFORNIA GAS COMPANY,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this action on April 25, 1975, affirming the orders of the Federal Power Commission (Commission).

Opinions Below.

A copy of the judgment and opinion of the Court of Appeals, styled *Pacific Lighting Service Company, et al. v. Federal Power Commission,* is appended hereto as Appendix A. The opinion of the Court of Appeals is reported at .... F.2d .....

Copies of the Commission's orders issued *In the Matter of Transwestern Pipeline Company* in Docket

No. RP73-101, entitled "Order Accepting for Filing Tendered Tariff Sheets, Establishing Procedures, and Granting Interventions", "Order Denying Rehearing and Reconsideration, Instituting Complaint Proceeding, and Establishing Procedures", and "Order Denying Motion to Vacate and Set Aside Prior Order and Granting Motions for Stay of Procedural Dates", issued May 31, 1973, August, 1, 1973 and September 21, 1973, respectively, which were the subject of the opinion of the Court of Appeals, are appended hereto as Appendix B. These orders have not been officially reported.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered April 25, 1975. The Court of Appeals denied Petitioners' petition for rehearing, *en banc*, on June 9, 1975. A copy of the order of the Court denying the petition for rehearing, *en banc*, is appended as Appendix C. The jurisdiction of the Court to review the judgment in question by writ of certiorari is conferred by 28 U.S.C. §1254(1).

Questions Presented.

May the Federal Power Commission, in complete disregard of the procedural safeguards of the Administrative Procedure Act, the Natural Gas Act, and the fundamental concept of due process, impose a curtailment plan upon the customers of an interstate natural gas pipeline company?

May the Federal Power Commission, in the absence of substantial evidence, issue an order placing a proposed curtailment plan into effect?

May the Federal Power Commission rely upon a statement of policy in lieu of substantial evidence in effectuating curtailment plans?

May the Federal Power Commission ignore the procedural guidelines set forth by this Supreme Court in imposing curtailment plans?

Constitutional and Statutory Provisions Involved.

The Fifth Amendment to the Constitution of the United States provides in part:

> "No person shall . . . be deprived of . . . property, without due process of law. . . ."

This case also involves Sections 4, 5 and 19(b) of the Natural Gas Act of 1938 (NGA), 52 Stat. 822, 823 and 831, as amended, 15 U.S.C. §§717c, 717d, and 717r(b), which are set forth in full in Appendix D.

Further, this case involves Sections 551(4), 553, 556 and 557 of the Administrative Procedure Act of 1946 (APA), 60 Stat. 237-244, as amended, 5 U.S.C. 551 (4), 553, 556 and 557, which are set forth in full in Appendix E.

STATEMENT.

I.

Introduction.

In this proceeding the Ninth Circuit has erroneously approved certain unlawful orders of the Commission, placing into effect without any hearing and over the demands of Petitioners[1] certain tariff sheets proposed by Transwestern Pipeline Company (Transwestern), an interstate natural gas pipeline company. The tariff sheets set forth a permanent curtailment plan to govern deliveries of natural gas during periods of curtailment on Transwestern's system.

The Commission unlawfully ordered the tariff changes to take effect because it possessed no evidence supporting the proposed tariff sheets. The Commission's sole determination in ordering the tariff changes into effect was that the proposed changes are a mirror image of the Commission's policy statement in Order No. 467 as to curtailment plans. A mere statement of policy, however, is not evidence, much less substantial evidence as required by Section 19 of the NGA, 15 U.S.C. 717r, and it cannot be utilized as a lawful basis for Commission action.

Not only has the Commission erred by imposing a curtailment plan upon the customers of the Transwestern system in the absence of substantial evidence, but it has also ignored the teachings of this Supreme Court in the procedures to be followed in curtailment cases, as set forth in *Federal Power Commission v. Louisiana Power & Light Company*, 406 U.S. 621 (1972).

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[1]Pacific Lighting Service Company (PLSC) and Southern California Gas Company (SoCal).

The Ninth Circuit erred in failing to require the Commission to follow the guidelines set forth by this Court and further erred in not requiring this Commission to fulfill its statutory responsibilities under the APA and the NGA.

II.

Procedural History.

a. Transwestern Files Curtailment Plan.

On April 25, 1973, Transwestern tendered for filing proposed changes in its Federal Power Commission Gas Tariff [R. 9-24] establishing curtailment procedures described as being in compliance with the Commission's statements of policy set forth in Order Nos. 467, 467-A, and 467-B in Docket No. R-469, entitled "Statement of Policy" [R. 120-125]; "Amendment to Statement of Policy" [R. 126-129]; and "Statement of Policy, and Order Denying Motions for Reconsideration" [R. 130-139], issued January 8, January 15, and March 2, 1973, respectively.[2] The proposed changes also eliminated the demand charge adjustment credits when curtailment is due to a gas supply shortage or due to compliance with directives of government agencies [R. 10, 19]. The Commission issued its notice of the proposed changes on May 4, 1973 [R. 25-26].

Petitioners on May 21, 1973, filed a joint petition to intervene [R. 42-46] stating that PLSC's purchases of natural gas from Transwestern comprise 75 percent of Transwestern's jurisdictional sales; all of PLSC's purchases are resold to SoCal. In fact, during the 12 months ending December 31, 1972, PLSC received

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[2]Hereafter any reference to Order No. 467 includes amendments unless otherwise noted. These statements are set forth in full in Appendix F.

270.9 billion cubic feet of natural gas from Transwestern which in turn was delivered to SoCal. These volumes, representing a significant portion of SoCal's supplies, aided SoCal in serving approximately 3.231 million customers and in providing natural gas service to a population of approximately 10.8 million in the central and southern parts of the State of California [R. 43]. Petitioners further requested that the Commission issue an order suspending for the maximum period allowable the tariff changes proposed by Transwestern and grant a Section 4 hearing to determine the justness, reasonableness, and lawfulness of Transwestern's curtailment proposals [R. 44].

b. Commission Issues Order Permitting Plan to Become Effective.

The Commission on May 31, 1973, issued its "Order Accepting for Filing Tendered Tariff Sheets, Establishing Procedures, and Granting Interventions", here under review [R. 53-56]. Therein the Commission, after reiterating Transwestern's proposed curtailment plan and stating that it reflected priorities for curtailment consistent with the Commission's Order No. 467, *supra* [R. 54-55], ordered that Transwestern's tariff sheets be accepted for filing effective June 1, 1973 [R. 55].

c. Petitioners Seek Rehearing.

Petitioners in their joint application for rehearing[3] [R. 74-83] of July 2, 1973, requested that the Commission modify its order of May 31, 1973, to provide for hearing pursuant to Section 4 of the NGA, 15

[3]Entitled, "Joint Application for Rehearing and Reconsideration and Motion for Modification of the Commission's Order of May 31, 1973, in This Proceeding so as to Provide for Hearing."

U.S.C. §717c, to consider the lawfulness of Transwestern's proposed changes [R. 74-76].

In support of their motion Petitioners stated that it was imperative that a hearing be held in order to determine the facts which underlie the purported need for the proposed curtailment plan; whether under such facts curtailment is legally supportable in the light of Transwestern's contracts and historical service relationship with PLSC; and, further, whether the proposed priorities and the proposed elimination of the demand charge adjustment credits are appropriate and nondiscriminatory [R. 76-77].

Petitioners further stated their particular concern with the application by the Commission of the priorities set forth in Transwestern's proposal [R. 18] because such application would unduly and unlawfully discriminate against the California customers on Transwestern's system. Such undue discrimination would result because SoCal, in order to comply with the directives of the California Public Utilities Commission (CPUC) regulations, must provide that usage on its system in excess of 200 Mcf per day, which can be adapted without undue hardship to an alternative fuel, be served on an interruptible basis. Because SoCal is required to establish service to its customers on such a basis, the effect on SoCal of the Commission's implementation of Transwestern's proposal is that the system of priorities can be applied so as to deprive it of such gas. Other distributor customers receiving volumes from Transwestern's system, which have been at liberty to enter into firm contracts for large volume sales, may have such sales classified in a higher priority, and thus receive greater volumes of gas. This result is unlawfully discriminatory

and deprives SoCal and PLSC of property without due process [R. 75-78].

Petitioners also argued to the Commission [R. 78-80] that Order No. 467 contains numerous statements promising a hearing in those instances where a filing has been made in accordance with its provisions [R. 120].

d. Commission Denies Rehearing.

The Commission on August 1, 1973, issued its "Order Denying Rehearing and Reconsideration, Instituting Complaint Proceeding, and Establishing Procedures" [R. 107-111], rejecting the Petitioners' request for a hearing under Section 4 of NGA, 15 U.S.C. §717c. This order is also challenged in this petition.

The Commission also in its August 1, 1973 order construed [R. 108-111] the application of July 1, 1973, for rehearing of the Public Utilities Commission of the State of California (CPUC) [R. 61-73] as a request for hearing under Section 5 of the NGA, 15 U.S.C. §717d and established hearing procedures under that section, placing the burden on the CPUC to prove a limited number of issues.

e. Petitioners Seek Court Review.

On August 20, 1973, Petitioners filed their joint petition for review of the Commission's orders of May 31, 1973, and August 1, 1973 with the U.S. Court of Appeals for the Ninth Circuit.

In a final attempt to avoid unnecessary litigation, Petitioners filed with the Commission on August 27, 1973, a joint motion [R. 112-117] to set aside the Commission's May 31, 1973 order. Petitioners further requested the Commission to issue an order staying the

procedural dates for the commencement of proceedings under Section 5 of NGA, 15 U.S.C. §717d, until such time as the Court of Appeals had decided the issues in this proceeding.

In its "Order Denying Motion to Vacate and Set Aside Prior Order and Granting Motions for Stay of Procedural Dates" [R. 118-119], issued September 21, 1973, also under review here, the Commission denied the motion to set aside the May 31, 1973, order and granted the motion for stay of the procedural dates.

On October 5, 1973, Petitioners filed with the Court of Appeals a joint petition for review of the Commission's order issued September 21, 1973, together with a "Joint Motion for Consolidation", requesting the Court to consolidate its review of the three Commission orders. This petition was granted on October 19, 1973.

f. The Curtailment Plan Takes Effect.

On January 8, 1974, Transwestern notified its customers that commencing with the month of January, 1974, deliveries of gas would be made in accordance with its curtailment plan.

g. Court of Appeals Denies Petition for Review.

On April 25, 1975, the Court of Appeals issued its decision in this proceeding which dismissed the consolidated petitions. Petitioners' Petition for Rehearing was denied by the Court of Appeals on June 9, 1975.

ARGUMENT.

I.

The Commission's Orders Here Under Review Violate the Petitioners' Rights Under the Administrative Procedure Act, and the Natural Gas Act.

a. The Commission Orders Rely Exclusively Upon Order No. 467.

The issuance of the orders, here under review, represents the culmination of a series of events executed by the Commission which act to deprive the customers of Transwestern from having any hearing as to the need for and appropriateness of a curtailment plan on the Transwestern system.

The Commission accepted Transwestern's filing of April 25, 1973, which consisted of a two-page cover letter and ten tariff sheets setting forth a curtailment plan. On May 31, 1973, the Commission issued a four-page order here under review in which it stated that Transwestern's proposed curtailment plan was consistent with its statement of policy in Order No. 467. The Commission ordered the sheets to take effect on June 1, 1973. Despite Petitioners' demands that they be accorded a hearing pursuant to Section 4 of the NGA, 15 U.S.C. §717c, the Commission, in a five-page order, also under review, rejected such requests on August 1, 1973. However, as a result of the CPUC's application for rehearing, the Commission found sufficient cause to establish hearing procedures under Section 5 of the NGA, 15 U.S.C. §717(d).

The Commission's "Statement of Policy", Order No. 467 in Docket No. R-469 [R. 120-125], sets forth its general policy as to the priorities-of-deliveries to be implemented by jurisdictional pipeline companies during

periods of curtailment. The Commission stated therein that it proposed to implement such policy in all matters arising under the NGA, 15 U.S.C. §§717-717w. The Commission stated, however, that (Mimeo p. 1) [R. 120]:

> "When applied in specific cases, opportunity will be afforded interested parties to challenge or support this policy through factual or legal presentation as may be appropriate in the circumstances presented."

As a result of numerous applications or petitions for rehearing of Order No. 467, the Commission issued Order No. 467-B on March 2, 1973, clarifying its general policy statement and further asserting its intention of providing a hearing (Mimeo p. 2) [R. 131]:

> "As discussed below, Order No. 467 is a policy statement and is not intended to initiate a proceeding or to provide a binding rule without further proceedings directed towards curtailment problems on specific pipelines."

Thus the Commission in promulgating its statement of policy promised the customers of the interstate pipeline companies an opportunity for further hearings. The Commission, however, had no intention of fulfilling such promises. The Commission's acceptance of the proposed Transwestern tariff sheets established a permanent curtailment program for the Transwestern system without benefit of any evidentiary hearing.

The Commission has taken the position that it may simply issue a statement of policy and if such policy is subsequently followed by an interstate pipeline company, then it need not accord the pipeline's customers

any participation in the determination of the justness and reasonableness of the proposed plan. As the Commission stated in its brief to the Court of Appeals (Commission's Br. p. 33):

> "The only essential finding of fact in the present case was that Transwestern's proposed curtailment plan was in conformity with the priorities of Order No. 467 which had been previously determined to be just and reasonable (R. 54-55). That finding is indisputably correct and supported by substantial evidence. Indeed, one need only to compare Transwestern's proposed plan (R. 1-20) with the priorities of Order No. 467-B (R. 130-139)."

It would be difficult to find a more concise description of the Commission's position in this proceeding than that which is embodied in the above statement. The Commission's determination that Transwestern's proposed tariff changes are just and reasonable, and its statement that (Commission's Br. p. 33) ". . . the priorities of Order No. 467 . . . had been previously determined to be just and reasonable" are wholly unsupported by evidence or findings in this record and are certainly not supported by mere reference to R. 54-55.

The Commission is stating that it was only necessary for Transwestern to file a list of curtailment priorities conforming with its policy in Order No. 467 and nothing remained for the Commission to do but check over the list. Such a procedure may be appropriate where the Commission has issued a rulemaking in accordance with the procedural requirements of Section 553 of the APA and given interested parties an opportunity to be heard. But the Commission cannot be

permitted to utilize a purported general policy statement in lieu of a rulemaking and subsequently apply it so as to affect the substantive rights of parties appearing before it.

b. Substantial Evidence Is Essential if the Commission's Actions Are to Be Sustained on Appeal.

The orders of the Commission in this proceeding are based upon its policy statement in Order No. 467 alone and such policy statement is not sufficient to provide the "substantial evidence" required of the Commission by the NGA in Section 19, 15 U.S.C. §717r, which states, "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Since the Commission afforded the Petitioners no hearing whatsoever in this proceeding, it is impossible for the Commission to have based its findings on evidence, much less "substantial evidence".

Furthermore, the 10-page filing by Transwestern, which merely parrots Order No. 467, is certainly not evidence of the suitability of the curtailment plan for the customers on its system. It is the Petitioner-customers that bear the burden of the curtailment, not the pipeline. It is the customers that have the greatest interest in the plan and the greatest interest in being heard.

The importance that the Commission base its findings on substantial evidence cannot be over-emphasized, as the United States Court of Appeals for the District of Columbia Circuit clearly recognized, in *Mobil Oil Corporation v. Federal Power Commission*, 483 F.2d 1238 (D.C. Cir. 1973). The Court in *Mobil* held that (483 F.2d at 1260):

> " 'Substantial evidence' the test of the Natural Gas Act, requires the consideration of the 'whole rec-

ord,' and the *whole record should contain sufficient unimpeachable—or at least persuasive—evidence to support the conclusion the Commission has reached if its action is to be sustained on appeal.*" (Emphasis added).

The Court of Appeals concluded that the informal hearing requirements of Section 553 are not sufficient to create a record which satisfied the substantial evidence test and stated:

> "Informal comments simply cannot create a record that satisfies the substantial evidence test. Even if controverting *information* is submitted in the form of comments by adverse parties, the procedure employed cannot be relied upon as adequate. *A 'whole record,' as that phrase is used in this context, does not consist merely of the raw data introduced by the parties.* It includes the process of testing and illumination ordinarily associated with adversary, adjudicative procedures. Without this critical element, informal comments, even by adverse parties, are two halves that do not make a whole. Thus, it is adversary procedural devices which permit testing and elucidation that raise information from the level of mere inconsistent data to evidence 'substantial' enough to support rates." (Emphasis added).

Thus, the imposition of Order No. 467 policies upon the Transwestern system in the complete absence of substantial evidence cannot be justified. The cavalier attitude of the Commission in its imposition of a curtailment plan upon the customers of the Transwestern system without permitting any opportunity for meaningful participation does not permit the testing and elucidation envisioned by the Courts to raise information from the level of mere conjecture to that of evidence substantial enough to support the Commission's actions herein.

c. Order No. 467 Is Not "Substantial Evidence".

The importance of Order No. 467 in this proceeding is that it is the only so-called evidence that the Commission had before it on which it could rely. Order No. 467, a policy statement, does not constitute "substantial evidence" to support the lawful issuance of the Commission's orders challenged herein. The Court of Appeals erred in this proceeding by determining that the only importance of Order No. 467 is whether it is a rulemaking or a statement of policy, and by further according a mere policy statement the force and effect of a properly promulgated rule.

The Court of Appeals for the District of Columbia Circuit had already specifically addressed itself to the issue of whether Order No. 467 is a policy statement or an improperly promulgated rulemaking under Sections 553, 556 and 557 of the APA (5 U.S.C. §§553, 556, and 557). In *Pacific Gas and Electric Co. v. Federal Power Commission*, 506 F.2d 33 (D.C. Cir. 1974) the Court of Appeals for the District of Columbia Circuit found it to be a statement of policy. That Court delineated the proper use of such statements declaring (506 F.2d at 38-39):

> "A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications."

* * *

"The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings. See *Columbia Broadcasting System, Inc. v. United States,* 316 U.S. 407, 416-17 (1942); *Public Service Commission of New York v. FPC,* 126 U.S. App. D.C. 26, 37, 373 F.2d 816, 827 (1967), *rev'd on other grounds,* 391 U.S. 9 (1968). A properly adopted substantive rule establishes a standard of conduct which has the force of law. In subsequent administrative proceedings involving a substantive rule, the issues are whether the adjudicated facts conform to the rule and whether the rule should be waived or applied in that particular instance. The underlying policy embodied in the rule is not generally subject to challenge before the agency."

"A general statement of policy, on the other hand, does not establish a 'binding norm'. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future. *When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy.*" (Footnotes omitted, Emphasis added).

Therefore, the decision of the Court of Appeals for the Ninth Circuit is in direct conflict with the above decision of the D.C. Circuit because it permits the Commission to promulgate a statement of policy and to subsequently apply the policy to the customers on the Transwestern system with the force and effect of a rule without any support whatsoever. The decision of the Ninth Circuit allows the Commission to entirely escape its responsibility to present evidence, to discover the necessary facts, to ascertain where the public interest lies, and to accord those directly affected by its actions meaningful participation prior to announcing binding precedent.

The Ninth Circuit decision permits the Commission to rely upon a statement of policy as having evidentiary value and thus defeats one of the basic purposes of the Administrative Procedures Act, which is to "give interested persons an opportunity to participate in the rulemaking through submission of written data, view, or arguments . . .", Section 553(c). A "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . .", Section 551(4). The Ninth Circuit erred in permitting the Commission to use a general statement of policy as having the same force and effect as a rulemaking.

d. Substantial Evidence Is Still the Test of the NGA Even Where Order No. 467 Is Being Applied.

That substantial evidence is required in a curtailment case in order for the Commission to lawfully impose Order No. 467 is the clear holding of *State of Louisiana v. Federal Power Commission,* 503 F.2d

844 at 871 (5th Cir. 1974). That case clearly stands for the concept that the Commission's order in a curtailment proceeding must withstand the substantial evidence test. The Court of Appeals for the Fifth Circuit there held that the Commission must give reasons supported by findings and those findings must have support in the record compiled in the particular case. In that proceeding the Commission had adapted much of the reasoning of Order No. 467 without relating it to the record evidence. The Court held that the Commission was clearly in error in so doing.

A similar holding has been reached in *Consolidated Edison of New York v. Federal Power Commission,* 511 F.2d 372 (D.C. Cir. 1974). The Court of Appeals for the District of Columbia Circuit in instructing the Commission stated as to the application of Order No. 467 curtailment plan (511 F.2d at 382):

> "At the same time, we must caution restraint lest the FPC interpret our action as a license to require adherence to the 467 paradigm without regard to the peculiarities of the Transco system and its customers. As we stated in *Pacific Gas and Electric Company v. FPC*, No. 73-1358, at 11 (D.C. Cir. June 26, 1974),
>
> > A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.
>
> We set forth evidence indicating problems posed by the unqualified application of Order No. 467 in this case. This evidence, as well as the doctrine of *Michigan Consolidated Gas Co.*, require that

> the Commission give full consideration to the interim settlement agreement and *take a fresh look at the 467 priorities in the context of the Transco system. Any curtailment plan imposed by the Commission will be reviewed by this court to ensure that such consideration has been given, and that the plan is supported by the record.*" (Footnote omitted, Emphasis added).

The opinion of the Ninth Circuit is clearly in conflict with the teachings of both the Court of Appeals for the Fifth Circuit and the District of Columbia Circuit. It has completely failed to require the Commission to provide reasons for the unqualified application of Order No. 467 in this case. The Commission has not provided any reasons for such unqualified application much less reasons supported in the record in this proceeding.

The Commission erred when it failed to accord Petitioners a hearing under Section 4 of the NGA. In the absence of such hearing, the Commission by summarily applying its so-called statement of policy in Order No. 467, made it impossible to obtain the substantial evidence necessary for a rational determination of the important issues in this proceeding.

It is clear from the above statutory and case law that the Commission in issuing its order in this proceeding did so in the absence of any evidence whatsoever, much less substantial evidence. The Court of Appeals erred in not recognizing this fact.

II.

The Ninth Circuit Erred in Failing to Hold the Commission to the Teachings of This Supreme Court.

The Commission's orders and the sustaining decision of the Ninth Circuit herein do not comport with the teachings of this Court in *Federal Power Commission v. Louisiana Power and Light Co.,* 406 U.S. 621 (1972). It is abundantly clear under that decision by this Court that the Commission has the option of either accepting for filing proposed tariff sheets embodying a curtailment plan by the pipeline company and, with or without suspending such proposed tariff sheets, proceeding with a hearing under Section 4 of the NGA, 15 U.S.C. §717c, in which the pipeline has the burden of proving that its plan is reasonable and fair or keep in effect the tariff *already on file* and proceed under Section 5, 15 U.S.C. §717d. This method of procedure was clearly envisioned by the Supreme Court when, after stating that the substantive standard governing Commission evaluation of curtailment plans is found in Section 4 of the NGA, it stated (406 U.S. at 643-645):

> "Two procedural mechanisms are available to enforce this antidiscriminatory provision of §4(b). As to a tariff already on file and in effect, FPC may proceed under §5(a). The §5(a) procedure has substantial disadvantages, however rendering it unsuitable for the evaluation of curtailment plans. FPC must afford interested parties a full hearing on the reasonableness of the tariff before taking any remedial action, and as we have observed 'the delay incident to determination in §5 proceedings through which initial certificated rates [as well as 'practices' and 'contracts'] are review-

> able appears high interminable.' *Atlantic Refining Co. v. Public Service Commission,* 360 U.S. 378, 389 (1959). In addition a prescribed remedial order can have only prospective application. FPC has therefore chosen to process curtailment plans under §§4(c), (d), and (e). Under these provisions, a pipeline's tariff amendments filed with FPC go into effect in 30 days unless suspended by the Commission. If a filing is challenged or FPC of its own motion deems it appropriate, it may suspend the amended tariff for up to five months, at the end of which time the amended tariff becomes effective pending the completion of hearings. In these hearings, the pipeline has the burden of proving that its plan is reasonable and fair."

This Court continued:

> "When emergency or other conditions arise and it appears desirable in the public interest to place a [curtailment] plan into effect, FPC may accept the filing, implement it immediately or suspend it, and employ the plan as a working guideline while hearings continue."

The Commission does not have the option to do what it has done in these proceedings, which is to place the proposed tariff into effect, in the absence of substantial evidence and any hearing whatsoever on either the existing tariff under Section 5, or the proposed changes under Section 4. The refusal of the Commission to grant a hearing under Section 4 and the complete absence of any evidence upon which to base such decision is contrary to this Court's decision in *Louisiana Power and Light* and violates the fundamental right of due process.

III.

The Offer of a Section 5 Hearing on a Limited Number of Issues Does Not Afford a Meaningful Hearing and Unlawfully Shifts the Burden of Proof.

The offer of the Commission to have a Section 5 hearing to permit the CPUC to challenge the appropriateness of Transwestern's tariffs on a limited number of issues once the tariffs have been received, approved and made effective does not accord Petitioners the hearing to which they are entitled. It unfairly places the burden upon the CPUC and intervenors in such proceeding to prove to the Commission that its unsupported preconceived ideas are unlawful. Furthermore, the Commission [R. 108-109] has severely limited the issues which it will consider in such proceeding. In the absence of a hearing which affords the full ventilation of all important issues in this proceeding, the Petitioners are not being accorded a true opportunity to be heard.

The offer of a hearing under Section 5 of the NGA after the application of the Order No. 467 curtailment policies places the CPUC and the customers of the pipeline in the position of having to show the Commission that its predeterminations as to an appropriate curtailment plan are incorrect. This shifting of the burden of proof clearly affects the substantive rights of Transwestern's customers (*Cities Service Oil Company v. Dunlap*, 308 U.S. 208 (1939); *Sampson v. Channell*, 110 F.2d 754 (1st Cir. 1940)). Moreover, in *Philadelphia Co. v. Securities and Exchange Commission*, 175 F.2d 808 (D.C. Cir. 1948) the S.E.C. had determined that a company, which had been earlier granted an exemption under the Public Utility Holding Company Act of 1935, 15 U.S.C. 379, must shoulder the burden of showing that it *not* later be deprived of such

exemption. The Court of Appeals stated that the S.E.C. had erroneously failed to assume the burden of proof in respect to the propriety of its proposed action and the S.E.C. must observe the essential rules of evidence. That Court concluded (175 F.2d at 818), "With some exceptions not here pertinent the burden of proof lies upon him who affirms, not him who denies."

The severe limitations, upon the issues which the Commission will hear, also preclude the possibility of a meaningful hearing. The Petitioners seek a hearing on the fundamental issues in this proceeding. They wish to determine the underlying facts which require curtailment, whether under such facts curtailment is legally supportable in the light of Transwestern's contracts and historical service relationship with PLSC, and, further, whether the proposed elimination of the demand charge adjustment credits are appropriate and non-discriminatory [R. 49-50].

The Commission has no intention of granting Petitioners a hearing on such issues. The Section 5 hearing offered by the Commission is to the CPUC and states [R. 108-109]:

> "Accordingly, we will consider the application filed by California as a complaint filed under Section 5 and order a hearing thereon, wherein California, as complainant may have the opportunity to present evidence to sustain its burden of showing that; (a) the plan unduly discriminates against California customers. (b) Priority (2) should be enlarged to include interruptible service, and (c) the list of priorities should be modified to include consideration for customers who have storage facilities and for partial requirements customers." (Footnote omitted).

This ignoring of the Petitioners' demands for a full hearing as to all aspects, coupled with a mean offer of a Section 5 hearing to the CPUC, is a gross disregard for the rights of the pipeline customers when a permanent curtailment plan is being imposed upon them.

IV.

The Decision of the Ninth Circuit Permits the Commission to Avoid Its Statutory Responsibilities.

Petitioners assert that when the Commission engages in a summary action, *i.e.*, the decision not to have a hearing, it must set forth the reasons and the facts in support of its decision. It must provide the reviewing Court with sufficient information so that the Commission's action can be reviewed in a meaningful fashion. The orders of the Commission in this case do not provide sufficient information for such a meaningful review.

Petitioners do not seek review of the Commission's discretion to suspend or not suspend a filing under Section 4 of the Act.

Petitioners do not contend that they were entitled to a hearing *before* the tariff sheets were permitted to become effective. It is clear that the Commission possesses the authority to place the proposed curtailment plan into effect and subsequently to enter upon a hearing under Section 4 of the Act for the purpose of evaluating the effect of the proposed curtailment plan. It is also clear that *such was the procedure envisioned* by the Supreme Court in *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

The refusal of the Commission to hold a hearing under Section 4 of the Act is a reviewable act. Section 4

of the Act states that the Commission "shall have authority . . . to enter upon a hearing." The orders of this Commission refusing to commence upon a Section 4 hearing are reviewable under Section 19(b) which provides that any party to a proceeding *aggrieved by an order* issued by the Commission may obtain a review of such order. This grant of authority to the Circuit Court of Appeals of the United States would be meaningless if the Commission possessed unfettered authority to determine when it should enter upon a hearing.

Petitioners have been aggrieved by this order in sustaining the loss of volumes of gas and in the substantial pecuniary loss resulting from the elimination of the demand charge adjustment clause in the absence of any hearing whatsoever.

The Court of Appeals for the District of Columbia Circuit in *Pennsylvania Gas & Water Co. v. Federal Power Commission* (*Penn Gas*), 463 F.2d 1242 (D.C. Cir. 1972) in recognition of such reviewing authority has stated (463 F.2d 1246):

> "Whether the summary action of any agency in a particular case is fair, just, equitable, and in accord with the procedure required by law is a matter for judicial review, as in the case at bar."

Furthermore, that Court has established the standard against which the appropriateness of a Commission decision not to have a hearing must be measured. The Court made it clear that it was sustaining the Commission's action not to have further evidentiary hearings *because of the sizable body of evidence* which the Commission had before it for consideration. This evidence resulted in part from the fact that the Commission convened hearings in *Penn Gas* and a record was developed.

The Court continued:

> "As this court noted in *Citizens for Allegan County, Inc.* [*Citizens for Allegan County, Inc. v. Federal Power Commission,* 414 F.2d 1125 (D.C. Cir. 1969)]:
>
> > 'We conclude that the information presented to the FPC in the applications, exhibits, affidavits, intervention petitions and other pleadings, developed the salient facts of the dispute to a sufficient depth and detail that the Commission was enabled to perceive, define, and resolve the various strands of public interest. *It is important that the Commission's opinion addressed itself to each of the problems raised by petitioner and set forth its reasons for concluding that the public interest lay in* [*rejecting them*].'" (Emphasis added).

The Ninth Circuit has ignored entirely the standard imposed on the Commission by the District of Columbia Circuit. The Ninth Circuit made no attempts to evaluate the information relied upon by the Commission, and the Commission made no attempt in its orders to justify its decision. In fact, the Commission had no information pertinent to the Transwestern system upon which it could rely. The Commission relied solely upon the 10-page filing of Transwestern, which merely parroted Order No. 467. There was no attempt by the Commission to gather sufficient data and information upon which it could develop the salient facts to define and resolve the various strands of public interest. In addition, the Commission rigorously avoided such responsibilities. Furthermore, the Commission's orders do not specifically address each of the problems raised by Petitioners, much less set forth its reasons for rejecting their demands. The Ninth Circuit erred by permitting the Commission to avoid its statutory responsibility to ascertain where lies the public interest when a proposed tariff is filed. The Court further erred by not requiring that the Commission issue an opinion clearly informing the customers of the pipeline and the reviewing Court of its reasons for ordering the proposed tariff changes into effect.

That the Commission has a duty to ascertain where the public interest lies in considering the appropriateness of *curtailment plans* has most recently been stated in *Rhode Island Consumers' Council v. Federal Power Commission,* 504 F.2d 203 at 210 (D.C. Cir. 1974):

> "The need for an adequate record is not rigidly tied to particular procedures. Our cases have consistently held that the procedures required are those appropriate to the issues raised. * * * When important decisions turn on the particular weight to be attributed to certain facts, the Commission may have a duty to probe beyond 'canned' writings or to allow the parties to illuminate the issues through exposure to questioning designed to separate inferences from hard data and ventilate interpretive assumptions."

The Ninth Circuit has failed to recognize that the Commission has a duty in the instant proceeding to permit the customers of Transwestern to illuminate the issues and to probe beyond the slender filing of Transwestern tariff sheets. Such action is necessary to determine what the most appropriate and reasonable curtailment plan may be for Transwestern's customers in the light of the facts and circumstances prevailing on Transwestern's system.

The avoidance by the Commission of its statutory duty to ascertain from sufficient data and information where the public interest lies and the subsequent issuance of its orders in the absence of substantial evidence constitutes reversible error. The Ninth Circuit erred in not so recognizing.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

K. R. EDSALL,
General Counsel for Petitioner, Southern California Gas Company.

Of Counsel.
THOMAS D. CLARKE,
Attorney.

APPENDIX A.

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U.S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

April 25, 1975

73-2538—Pacific Lighting Service Co. v. FPC
73-2922—Pacific Lighting et al. v. FPC
73-2630—Southern California Edison Co. v. FPC
73-2665—People of State of California, et al. v. FPC

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered April 25, 1975 dismissing the petitions for review in the above cases.

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

EMIL E. MELFI, Jr., Clerk
U.S. Court of Appeals

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Pacific Lighting Service Company, Petitioner, v. Federal Power Commission, Respondent. No. 73-2538.

Pacific Lighting Service Company and Southern California Gas Company, Petitioners, v. Federal Power Commission, Respondent. No. 73-2922.

Southern California Edison Company, Petitioner, v. Federal Power Commission, Respondent. No. 73-2630.

The People of the State of California and the Public Utilities Commission of the State of California, Petitioners, v. Federal Power Commission, Respondent. No. 73-2665.

OPINION

On Petitions for Review of Orders of the Federal Power Commission.

Filed: April 25, 1975.

Before: CHAMBERS, CHOY, and GOODWIN, Circuit Judges.

PER CURIAM:

Petitioners, consumers of natural gas, seek review of the Federal Power Commission's order in *Transwestern Pipeline Company* (FPC No. RP 73-101) approving Transwestern's proposed tariffs which set forth nine curtailment priorities to provide for reduction of delivery to natural gas users during times of resource shortage.

The petitioners challenge the Commission's procedure. First, the petitioners assert that Commission Order No. 467, establishing guidelines for curtailment

schemes, is invalid because not promulgated in accordance with Administrative Procedure Act (5 U.S.C. §§ 551 *et seq.*) rule-making procedures. If petitioners could strike down Order No. 467, they would feel more secure in attacking Transwestern's curtailment priorities, because the challenged tariffs track Order No. 467 almost haec verba. Order No. 467 is, however, a statement of Commission policy, and not a "rule". It is therefore exempt from the APA's notice and hearing requirements. *See* 5 U.S.C. § 553(b)(3)(A).

The petitioners further insist that they were entitled to a pre-approval hearing under Section 4 of the Natural Gas Act, 15 U.S.C. § 717c(e),[1] in which the pipeline company would have the burden of proving that its proposed curtailment schedules were just and reasonable. The Commission contends that hearings pursuant to Section 5 of the Natural Gas Act, 15 U.S.C. § 717d,[2] to be held after the tariffs are provisionally approved, satisfy the requirements of relevant statutory

---

[1] 15 U.S.C. 717c(e):

"Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service * * *. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company * * *."

[2] 15 U.S.C. § 717d(a):

"Whenever the Commission, after a hearing had upon its own motion or upon complaint of any * * * gas distributing company, shall find that any * * * classification demanded * * * by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any * * * contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable * * * classification * * * or contract to be thereafter observed and in force, and shall fix the same by order * * *."

and case law, although in such hearings the burden of proof falls upon those objecting to the filed tariffs (the petitioners).

The Supreme Court has not, on the merits, held that the Commission must hold curtailment-plan hearings under either § 4 or § 5 of the Natural Gas Act. However, in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), the Court expressed a preference for § 4 hearings. 406 U.S. at 643-644.

In this case the Commission apparently believed that the Court's expressed preference for § 4 hearings did not foreclose FPC discretion to hold § 5 hearings. We construe § 4's "shall have authority" language to make the holding of hearings under that section discretionary rather than mandatory. We cannot say that the Commission abused its discretion in ordering § 5 hearings on the facts before it in these cases.

However, we assume that the Commission has noted that in *Louisiana Power* the Supreme Court stated: "[t]he FPC must afford interested parties a full hearing on the reasonableness of the tariff * * *." 406 U.S. at 643. These observations apply equally to § 4 and § 5 hearings. The Commission's choice of § 5 as the hearing format for evaluation of objections to Transwestern's curtailment plan does shift the burden of proof, but does not necessarily deprive the petitioners of a full and fair opportunity to present facts bearing upon the reasonableness of the curtailment priorities.

We express no opinion upon the merits of issues that may be developed in future hearings before the Commission at the request of these petitioners. Counsel for the Commission has represented to this Court that hearings will be available to petitioners, and we will assume

until the contrary appears that these hearings will meet the fairness standards of *Louisiana Power*.

We note further that the Commission agrees that it is required, and plans, to comply with the National Environmental Policy Act of 1969, §§ 102, 105, 42 U.S.C. §§ 4332, 4335. *See State of Louisiana v. FPC*, ... F.2d .... (5th Cir. 1974).

Accordingly, these consolidated petitions are dismissed.

APPENDIX B.

Order Accepting for Filing Tendered Tariff Sheets, Establishing Procedures, and Granting Interventions. (Issued May 31, 1973.)

United States of America, Federal Power Commission.

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Rush Moody, Jr.

Transwestern Pipeline Company. Docket No. RP73-101.

On April 25, 1973, Transwestern Pipeline Company (Transwestern) tendered for filing proposed tariff sheets to its FPC Gas Tariff, First Revised Volume No. 1.[1] The tendered tariff sheets establish curtailment procedures, eliminate demand charge adjustment credits during certain curtailments, and incorporate minor changes in the wording of certain sections so as to include reference to Section 11 of the General Terms and Conditions where appropriate. Transwestern requests an effective date of June 1, 1973.

Transwestern states that although it has taken all reasonable and prudent steps to avoid a gas supply shortage, these tariff revisions are necessary since it is gas deliveries in the near future.

Transwestern's nine categories contained in Section 11.3 are identical to those enumerated in Docket No. R-469. The currently effective Section 11.3 pertains

[1]Designated as: Thirty-first Revised Sheet No. 4, Twenty-sixth Revised Sheet No. 6-A, Second Revised Sheet No. 6-B, First Revised Sheet No. 6-C, Tenth Revised Sheet No. 6-D, First Revised Sheet No. 6-E, Third Revised Sheet No. 30, Original Sheet No. 30-A, Original Sheet No. 30-B and Third Revised Sheet No. 32-A to Transwestern's FPC Gas Tariff, First Revised Volume No. 1.

only to force majeure depletion of gas supply involving Rate Schedules CDQ-1 and LX and these schedules are available only to Pacific Lighting Service Company. The revised Section 11.3 applies to Rate Schedules CDQ-1, CDQ-2, and CDQ-3. Cities Service Gas Company is the only CDQ-2 or CDQ-3 buyer. The remaining Rate Schedules are not subject to the proposed curtailment procedures. No deliveries are being made under Rate Schedule LX and Rate Schedules SG-1 and RW-1 are to small customers and towns constituting less than 0.4 percent of Transwestern's total 1971 sales. The CDQ schedules accounted for 98.9 percent of 1971 sales. The remaining 0.7 percent of 1971 sales were emergency, field and mainline residential, commercial or industrial sales.

The revised Section 11.3 provides for a pro-rata curtailment within each of the nine categories based on each customer's percentage of total entitlement within each priority when curtailment is necessary due to impaired deliveries of any cause. This section contains an emergency provision to provide relief from environmental emergencies or to forestall irreparable injury to life or property. After buyer establishes that an emergency exists, Transwestern will exempt buyer from curtailment to the extent it is able without creating other emergencies on its system.

Transwestern's proposed new Sections 11.4 and 11.5 eliminate demand charge adjustment credits where curtailment of delivieries is due to a gas supply shortage or to compliance with directives of governmental agencies. Transwestern states that it will bear a share of the costs of curtailment through the fixed costs component included in commodity rates.

Petitions to intervene were filed by the following parties: The People of the State of California and the Public Utilities Commission of the State of California on May 18, 1973; San Diego Gas & Electric Company on May 18, 1973; Cities Service Gas Company on May 22, 1973; Southern California Edison Company on May 22, 1973; and Pacific Lighting Service Company and Southern California Gas Company on May 22, 1973.

As previously noted, we take cognizance of the fact that the Transwestern filing reflects priorities for curtailment consistent with our Statement of Policy in Docket No. R-469 issued on January 8, 1973. Petitioners Pacific Lighting Service Company and Southern California Gas Company seek a suspension of the tendered filing for the full statutory period. However, no specific grounds are stated in support of the requested suspension. In light of the foregoing we will not suspend Transwestern's tendered tariff filing. Any petitioner can, of course, file a petition for extraordinary relief from application of the filed curtailment plan or file a complaint under Section 5(a) of the Natural Gas Act, if his objections relate instead to systemwide aspects of the curtailment plan. Furthermore, should a dispute arise regarding the end-use data to be submitted by Transwestern, as hereinafter ordered, we will at that time act on motions related thereto.

The Commission finds:

(1) It is necessary and appropriate in carrying out the provisions of the Natural Gas Act that the proposed tariff sheets tendered by Transwestern on April 25, 1973, should be accepted for filing.

(2) The participation in this proceeding of the above named petitioners may be in the public interest.

The Commission orders:

(A) Transwestern's tariff sheets, hereinbefore described, are hereby accepted for filing effective June 1, 1973.

(B) A Staff conference for the purpose of seeking means to obtain end-use and other relevant data shall be held with all parties on June 15, 1973, at 10:00 a.m. (EDT) in a conference room of the Federal Power Commission.

(C) Transwestern must submit end-use data to the Commission and serve it on all interveners on or before July 16, 1973.

(D) The above-named petitioners are hereby permitted to intervene in this proceeding subject to the Rules and Regulations of the Commission; *Provided, However,* that the admission of such interveners shall not be construed as recognition that they or any of them might be aggrieved because of any order or orders issued by the Commission in this proceeding. If the petitioners wish to allege specific grounds for intervention, they may file separate applications for special relief or complaints under Section 5(a) of the Natural Gas Act.

By the Commission.

[Seal]

Kenneth F. Plumb,
Secretary.

Order Denying Rehearing and Reconsideration, Instituting Complaint Proceeding, and Establishing Procedures. (Issued August 1, 1973.)

United States of America, Federal Power Commission.

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr. and William L. Springer.

Transwestern Pipeline Company. Docket No. RP73-101.

By order issued May 31, 1973, the Commission, *inter alia,* accepted for filing tariff sheets, tendered by Transwestern Pipeline Company (Transwestern)[1], and established procedures for the filing of end-use data.[2] Applications for rehearing were filed on July 2, 1973, by Pacific Lighting Service Company (PLSC), Southern California Gas Company (SoCal), and the People of the State of California and the Public Utilities Commission of the State of California (California). On July 13, 1973, and July 25, 1973, San Diego Gas & Electric Company (San Diego) and Southern California Edison Company (Edison) respectively filed a motion requesting permission to file an application for rehearing out-of-time and attached the application to its motion.[3]

In their applications for rehearing, Petitioners urge reconsideration of our acceptance of Transwestern's

[1]The tariff sheets contained Transwestern's proposed curtailment plan reflecting priorities for service during curtailment consistent with our Statement of Policy issued in Docket No. R-469.

[2]By notice issued July 11, 1973, the time for filing the data was extended to September 24, 1973.

[3]We will grant the motions since such action will neither delay the determination of this proceeding nor adversely affect any party to this proceeding. However, the filing will be accepted and treated as motions for reconsideration.

proposed curtailment plan and, upon reconsideration, instituting a hearing under Section 4 of the Natural Gas Act to determine the lawfulness of that plan. While Petitioners broadly allege the impropriety of the order of priorities established by Transwestern's filing, their concern appears to be directed more to their position on the priority scale than urging the impropriety of the priorities themselves. For example, PLSC, SoCal, and San Diego allege that a Section 4 hearing is necessary to determine that the priorities "are appropriate and nondiscriminatory" (p. 4). They then argue that the application of those priorities may be unlawful against Transwestern's California customers, who are required under the regulations of the California Public Utilities Commission to provide only interruptible service to industrial consumers in excess of 200 Mcf per day. California, on the other hand, urges rehearing on the basis, *inter alia,* of the need to expand priority (2) to include interruptible sales (p. 7) and the need for considering storage and partial requirements customers in formulating the curtailment plan (pp. 8-9), while also urging the possible discrimination of the priority list on the California customers based on its "interruptible" requirement (pp. 4-6). Accordingly, the need to initiate a Section 4 hearing to determine the lawfulness of the priorities *per se* has not been demonstrated.

The application for rehearing filed by California, unlike the joint application of PLSC and SoCal, does not state that a hearing under Section 5 of the Act is not requested. The pleadings present issues that, in our judgment, should be adjudicated on the basis of an evidentiary record. Accordingly, we will consider the application filed by California as a complaint filed under Section 5 and order a hearing thereon, wherein Cali-

fornia, as complainant may have the opportunity to present evidence to sustain its burden of showing that; (a) the plan unduly discriminates against California customers. (b) Priority (2) should be enlarged to include interruptible service, and (c) the list of priorities should be modified to include consideration for customers who have storage facilities and for partial requirements customers.[4]

The Commission finds:

(1) Good cause exists to grant San Diego's and Edison's motions and permit them to file an application for rehearing out-of-time which will be treated as motions for reconsideration.

(2) The assignments of error and grounds for rehearing set forth in the applications for rehearing and motions for reconsideration of our May 31, 1973, order issued in this proceeding present no new facts or principles of law which were not considered by the Commission when it issued its order or which having now been considered warrant any change in said order.

(3) It is necessary and proper for the purpose of carrying out the provisions of the Natural Gas Act that California's application for rehearing be treated as a complaint filed under Section 5 of the Natural Gas Act and that a hearing be initiated and the procedures established for the hearing, all as hereinafter ordered.

The Commission orders:

(A) The motions filed by San Diego and Edison on July 13, 1973 and July 25, 1973, respectively requesting permission to file an application for rehearing out-of-time is hereby granted.

[4]California's further argument on the application of the National Environmental Policy Act in curtailment proceedings was refuted by the Commission in its order issued August 22, 1972, in *El Paso Natural Gas Company,* Docket No. RP72-6.

(B) The applications for rehearing filed in this proceeding by PLSC, SoCal, and California, are hereby denied. The applications for rehearing and treated as motions for reconsideration filed by San Diego and Edison are hereby denied.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by the Natural Gas Act, particularly Sections 5, 14, 15, and 16 thereof, a hearing on the complaint filed by California shall be convened concerning the issues of why Transwestern's California customers should not adhere to the list of curtailment priorities set forth in Transwestern's tariff, why priority (2) in that list should be modified to include interruptible service, and why the list of priorities should be modified to include consideration for customers who have storage facilities and for partial requirements customers.

(D) Answers and responses to the complaint under Section 1.6(a) of our Rules of Practice and Procedure, are hereby waived, without prejudice.

(E) As established by our notice of July 11, 1973, Transwestern shall serve its end-use data on all parties in this proceeding including Commission staff, on or before September 24, 1973. California and parties in support of California's stated contentions shall serve their cases-in-chief in response to ordering paragraph (C) above on all parties to this proceeding including Commission staff, on or before October 25, 1973.

(F) Pursuant to the authority contained in and subject to the jurisdiction conferred on the Federal Power

Commission by the Natural Gas Act, particularly Sections 5, 14, 15, and 16 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the Regulations under the Natural Gas Act, a public hearing shall be convened on November 19, 1973, at 10:00 a.m. (EST) at the offices of the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426 concerning the issues involved in the proceeding initiated in ordering paragraph (C) above.

(G) An Administrative Law Judge to be designated by the Chief Administrative Law Judge for that purpose [see Delegation of Authority, 18 CFR 3.5(d)], shall preside at the hearings in this proceeding, and shall prescribe relevant procedural matters not herein provided.

(H) Notices of intervention and petitions to intervene in the complaint proceeding may be filed with the Federal Power Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, on or before August 30, 1973, in accordance with the Commission's Rules of Practice and Procedure (18 CFR 1.8 or 1.37).

By the Commission.

[Seal]

Mary B. Kidd,
Acting Secretary.

Order Denying Motion to Vacate and Set Aside Prior Order and Granting Motions for Stay of Procedural Dates. (Issued September 21, 1973.)

United States of America, Federal Power Commission.

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., and William L. Springer.

Transwestern Pipeline Company. Docket No. RP73-101.

On August 27, 1973, a joint motion was filed by Southern California Gas Company and Pacific Lighting Company (Movants) requesting the Commission to vacate and set aside its order issued May 31, 1973, which, *inter alia,* accepted for filing without suspension certain tariff sheets tendered by Transwestern Pipeline Company (Transwestern). In their filing, Movants also moved for a stay of the procedural dates established in the Commission's order issued August 1, 1973, which, *inter alia,* set procedural dates for the complaint hearing therein established. A motion for continuance of a procedural filing date was filed by the People of the State of California and the Public Utilities Commission of the State of California (California) on September 7, 1973.[1]

This proceeding involves a filing by Transwestern of a proposed curtailment plan, which conformed in all respects to the Commission Policy Statement issued in Docket No. R-469, Order No. 467-B. Based on its conformity with the Policy Statement, the Commission by order issued May 31, 1973, accepted for filing, with

[1]In its answer filed on September 12, 1973, Transwestern supports the requests for continuance of the procedural dates.

out suspension, Transwestern's tendered tariff sheets containing its proposed curtailment plan. Movants then filed a petition for rehearing of that order, which was denied by order issued August 1, 1973.[2] Movants instant motion to vacate and set aside essentially reiterates arguments similar to those contained in its petition for rehearing and consequently sets forth no new facts or principles of law which were not considered by the Commission when it issued its orders or which having now been considered warrant any change in those orders. Accordingly, Movants motion to vacate and set aside should be denied.

In their motion for stay and continuance, Movants and California, as well as the response of Transwestern, urge the postponement of the procedural dates to permit them to pursue their Court appeals. In support of its motion, California states that the stay of the procedural dates would not detrimentally affect the parties opposing its position since the curtailment plan opposed by it will be in effect and operative during the period required to obtain a determination of the Court appeals. Since California and Movants who also oppose the curtailment plan request the stay, we believe that the grant of the motion for stay would not be detrimental to the public interest.

The Commission finds:

(1) Good cause exists to deny the motion to vacate and set aside filed by Movants.

(2) Good cause exists to grant the motions for stay filed herein by Movants and California, as hereinafter ordered.

---

[2]Movants and California have filed appeals of the May 31 and August 1 orders in the United States Court of Appeals for the Ninth Circuit, Case Nos. 73-2538 and 73-2665.

The Commission orders:

(A) The motion to vacate and set aside filed by Movants on August 27, 1973, is hereby denied.

(B) The motion for continuance of procedural date filed by California on September 7, 1973, and the motion for stay of the procedural dates established in our August 1, 1973, order filed by Movants on August 27, 1973, are hereby granted and the commencement of the hearing ordered in this proceeding is hereby postponed until further order of the Commission.

By the Commission.

[Seal]

Kenneth F. Plumb,
Secretary.

APPENDIX C.

Order.

United States Court of Appeals, for the Ninth Circuit.

Pacific Lighting Service Company, Petitioner, v. Federal Power Commission, Respondent. No. 73-2538.

Pacific Lighting Service Company and Southern California Gas Company, Petitioners, v. Federal Power Commission, Respondent. No. 73-2922.

Southern California Edison Company, Petitioner, v. Federal Power Commission, Respondent. No. 73-2630.

The People of the State of California and the Public Utilities Commission of the State of California, Petitioners, v. Federal Power Commission, Respondent. No. 73-2665.

On Petition for Review of Orders of the Federal Power Commission.

Before: CHAMBERS, CHOY, and GOODWIN, Circuit Judges.

Nos. 73-2538, 73-2922, 73-2630, 73-2665

The court having considered the matter,

The petition for rehearing filed May 9, 1975, by Southern California Gas Company and Pacific Lighting Service is denied;

The petition for rehearing filed May 9, 1975, by The People of the State of California and The Public Utilities Commission of the State of California is denied;

The petition for rehearing filed May 9, 1975, by Southern California Edison Company is denied.

APPENDIX D.

Natural Gas Act of 1938, §§4, 5, 19(b), 52 Stat. 822, 823, 831, as Amended, 15 U.S.C. §§717c, 717d, 717r(b):

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, to-

gether with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commssion, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company 1a or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period

than five months beyond the time when it would otherwise go into effect; 1a and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. §717c]

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the

cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. [52 Stat. 823 (1938); 15 U.S.C. §717d]

REHEARING; COURT REVIEW OF ORDERS

Sec. 19. * * *

* * *

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained or was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless

such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [52 Stat. 831 (1938); 15 U.S.C. § 717r]

APPENDIX E.

Administrative Procedures Act (1967).

§551. *Definitions.*

. . .

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

§553. *Rule making.*

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.

§556. *Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.*

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the

submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 386.

§557. *Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.*

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the re-

ception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 387.

APPENDIX F.

Order No. 467.

Statement of Policy. (Issued January 8, 1973.)

United States of America, Federal Power Commission.

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Rush Moody, Jr. (18 CFR 2.78).

Utilization and Conservation of Natural Resources—Natural Gas Act. Docket No. R-469.

This order contains a statement of policy by the Commission on priorities-of-deliveries by jurisdictional pipeline companies during periods of curtailment. The Commission proposes to implement such policy in all matters arising under the Natural Gas Act.

When applied in specific cases, opportunity will be afforded interested parties to challenge or support this policy through factual or legal presentation as may be appropriate in the circumstances presented. It is the Commission's intention in this statement to focus the attention of all parties concerned with the natural gas industry upon the general policy views of the Commission in advance of the filing of particular applications with the Commission and thereby to permit affected entities the opportunity to evolve a rational energy resource development program considering national energy goals and objectives as they may be stated from time-to-time, and to minimize the complexity and length of administrative proceedings before this Commission.

Concurrently, the Commission is issuing, in Docket No. R-467, *Utilization and Conservation of Natural Resources—Natural Gas,* a notice of proposed policy

statement pertaining to the priorities of usage of our natural gas supply. In this notice, we discussed the critical shortage of natural gas supply and its effect on this Nation's progress. We then found that it was necessary to promulgate procedures that would maximize high priority of usage for this natural resource. We adopt that discussion here and find, based on that analysis, that procedures should be adopted to maximize the high priority usage of natural gas during curtailment periods on a pipeline's system.

General Discussion—As stated in that notice, the Commission has been called upon to determine the propriety of curtailment procedures to be invoked by jurisdictional pipeline companies during periods of curtailed deliveries. In reaching its decisions, the Commission has reviewed the records in those proceedings and, based upon those reviews, has concluded that the customers' use of the natural gas fall into certain set categories. Accordingly, we believe that those categories are generally applicable industry-wide and can be utilized for establishing priorities-of-delivery during periods of short supply on any jurisdictional pipeline's system. We, of course, recognize that extraordinary circumstances may preclude the strict adherence to the priorities established and, consequently, we will permit those persons who allege that their circumstances require such extraordinary treatment to file petitions for relief under Section 1.7(b) of our Rules of Practice and Procedure. Barring such circumstances, our review of those curtailment proceedings and our knowledge of the industry convinces us that the priorities-of-delivery set forth below should be applied to all jurisdictional pipeline companies during periods of curtailment.

The curtailment procedures to be followed must have as their basic objective the protection of deliveries for

the residential and small volume consumers who cannot be safely curtailed on a daily basis and requiring, as the initial level of curtailment, reduction in deliveries for large volume interruptible sales. As we pointed out in our *Ark-La* decision[1] issued concurrently herewith (*mimeo*, pp. 17-18):

> We are impelled to direct curtailment on the basis of end use rather than on the basis of contract simply because contracts do not necessarily serve the public interest requirement of efficient allocation of this wasting resource. In time of shortage, performance of a firm contract to deliver gas for an inferior use, at the expense of reduced deliveries for priority uses, is not compatible with consumer protection.
>
> Secondly, we have determined that interruptible sales are for the most part, predicated on end-use considerations; those customers, be they direct sales or indirect sales, who require gas for human needs service or non-substitutable industrial service do not contract on an interruptible basis. Interruptible service, at the lower rates charged for such service, envisions interruption. And accordingly, interruptible customers can most reasonably be expected to have alternate fuel facilities already operational. We conclude, therefore, that curtailment should first fall on those who have not historically borne the full-fixed costs of providing gas service, particularly since these customers are best prepared to accept interruptions in service and clearly do not require uninterrupted service for protection of life or property.

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[1] *Arkansas-Louisiana Gas Company*, ... FPC ...., Docket No. RP71-122, issued January 5, 1973.

Finally, if curtailment reaches beyond the level of interruptible service into firm contract service, we commit ourselves to the proposition that large volume boiler fuel usage is inferior and should be curtailed before other firm service. Aside from the established physical fact that combustion of natural gas for raising steam in boilers and its subsequent conversion into electricity or mechanical energy results in a loss of roughly two-thirds of the heating value of the gas used—which we regard as unacceptably inefficient in time of shortage—we note also that those who use gas as boiler fuel generally can substitute other fuels more readily and at lower overall cost than other gas users; additionally, pollution control is more practical because of the large size of individual installations. Other fuels generally can be physically substituted in large boiler fuel applications with less inconvenience and less possible adverse consequences than in other industrial applications, such as direct fired uses, and other uses demanding precise temperature control, flame characteristics, instantaneous response and atmosphere quality. Finally, subordinating boiler fuel use with its comparative ease of substitutability, to other large scale industrial and commercial uses should tend to minimize plant and business closings and the attendant economic loss from decreased production and payrolls, and the personal hardships of unemployment [Footnote omitted].

In establishing the priorities-of-service for the use of the natural gas supply, it is obvious that some direct and indirect customers use their supply of natural gas for similar end-use purposes. Customers with similar usages for the fuel should be accorded the same treatment to avoid any undue discrimination or preference among them. Accordingly, we will place the direct and indirect customers in the same priority-of-service position when their use of natural gas is comparable.

In determining our priority-of-service listing, we are cognizant of the economic impacts that will flow from that listing. However, we believe that we have no choice but to impose certain restrictions on the sale of natural gas within the limits of our jurisdiction during this time of supply shortages. Our decision is made with full knowledge that certain sales to ultimate consumers are beyond our jurisdiction. In those instances, we solicit the cooperation of State authorities to aid implementation of this program.

The Commission finds:

(1) The notice and effective date provisions of 5 U.S.C. 553 do not apply with respect to the policy statement here adopted.

(2) It is appropriate and in the public interest in administering the Natural Gas Act to adopt the policy statement as herein ordered.

The Commission, acting pursuant to the provisions of the Natural Gas Act, as amended, particularly sections 4, 5 and 7 (52 Stat. 822, 823, 824, 825; 56 Stat. 83, 84; 61 Stat. 459; 76 Stat. 72; 15 U.S.C. 717c, 717d, 717f,) *orders:*

(A) Part 2 of the Commission's General Rules of Practice and Procedure, General Policy and Interpretations, Subchapter A, Chapter I, Title 18 of the Code of Federal Regulations is amended by adding new Section 2.78(a) as follows:

§ 2.78. Utilization and Conservation of Natural Resources—Natural Gas

(a) The national interests in the development and utilization of natural gas resources throughout the United States will be served by recognition and implementation of the following priority-of-service categories for use during periods of curtailed deliveries by jurisdictional pipeline companies:

(1) Residential, small commercial (less than 50 Mcf on a peak day).

(2) Large commercial requirements (50 Mcf or more on a peak day) and firm industrial requirements for plant protection, feedstock, and process needs.

(3) All industrial requirements not specified in (2), (4), (5), (6), (7), or (8).

(4) Firm industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

(5) Firm industrial requirements for large volume (3,000 Mcf or more per day) boiler fuel use where alternate fuel capabilities can meet such requirements.

(6) Interruptible requirements of less than 1,500 Mcf per day.

(7) Interruptible requirements of intermediate volumes (from 1,500 Mcf per day through 3,000 Mcf per day).

(8) Interruptible requirements of more than 3,000 Mcf per day.

The priorities-of-deliveries set forth above will be applied to the deliveries of all jurisdictional pipeline companies during periods of curtailment on each company's system: except, however, that, upon a finding of extraordinary circumstances after hearing initiated by a petition filed under Section 1.7(b) of the Commission's Rules of Practice and Procedure, exceptions to those priorities may be permitted.

The above list of priorities requires the full curtailment of the lower priority category volumes to be accomplished before curtailment of any higher priority volumes is commenced. Additionally, the above list requires both the direct and indirect customers of the pipeline that use gas for similar purposes to be placed in the same category of priority.

(B) The amendment provided for herein shall be effective as of the date of issuance of this Order.

(C) The Secretary shall cause prompt publication of this Order to be made in the Federal Register.

By the Commission.

[Seal]

Kenneth F. Plumb,
Secretary.

Order No. 467-A.

Amendment to Statement of Policy.

(Issued January 15, 1973.)

United States of America, Federal Power Commission.

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Rush Moody, Jr.

Utilization and Conservation of Natural Resources—Natural Gas Act. Docket No. R-469.

By order issued January 8, 1973, we issued a statement of policy setting forth priorities-of-deliveries to be invoked by jurisdictional pipeline companies during periods of curtailment. The priorities set forth therein tracked our findings in the opinion we issued concurrently with the policy statement.[1] However, in setting out our statement of policy, we inadvertently omitted procedures to permit the pipeline companies to respond immediately to meet emergency situations that may occur during periods of curtailment.

As we stated in *Arkansas Louisiana, supra,* mimeo, p. 18:

> Arkla's curtailment plan must reflect sufficient flexibility to permit immediate response by Arkla to emergency situations during curtailment where supplemental deliveries are required to forestall irreparable injury to life or property. Revised tariff provisions to define and delimit emergency procedures should be filed for Commission review and approval.

[1] *Arkansas Louisiana Gas Company,* .... FPC ...., Opinion No. 643 issued January 8, 1973.

Emergency provisions in accordance with the above criteria should be contained in the tariffs of all jurisdictional pipeline companies. Additionally, the emergency provision should also permit the implementation of curtailment procedures to meet environmental emergencies that may occur on a pipeline's system. Accordingly, we are amending our statement of policy by adding a paragraph at the end of Section 2.78(a) of the Commission's General Policy and Interpretations to provide for the emergency provisions discussed above.

The Commission finds:

(1) The notice and effective date provisions of 5 U.S.C. 553 do not apply with respect to the amendment to the policy statement here adopted.

(2) It is appropriate and in the public interest in administering the Natural Gas Act to adopt the amendment to the policy statement herein ordered.

The Commission, acting pursuant to the provisions of the Natural Gas Act, as amended, particularly Sections 4, 5, and 7 (52 Stat. 822, 824, 825; 56 Stat. 83, 84; 61 Stat. 459, 76 Stat. 72; 15 U.S.C. 717c, 717d, 717f,) *orders:*

(A) Part 2 of the Commission's General Rules of Practice and Procedure, General Policy and Interpretations, Subchapter A, Chapter I, Title 18 of the Code of Federal Regulations is amended by adding a new paragraph at the end of Section 2.78(a) and, as amended, it will read as follows:

> §2.78 Utilization and Conservation of Natural Resources—Natural Gas
>
> (a) The national interests in the development and utilization of natural gas resources throughout the

United States will be served by recognition and implementation of the following priority-of-service categories for use during periods of curtailed deliveries by jurisdictional pipeline companies:

(1) Residential, small commercial (less than 50 Mcf on a peak day).

(2) Large commercial requirements (50 Mcf or more on a peak day) and firm industrial requirements for plant protection, feedstock and process needs.

(3) All industrial requirements not specified in (2), (4), (5), (6), (7), or (8).

(4) Firm industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

(5) Firm industrial requirements for large volume (3,000 Mcf or more per day) boiler fuel use where alternate fuel capabilities can meet such requirements.

(6) Interruptible requirements of less than 1,500 Mcf per day.

(7) Interruptible requirements of intermediate volumes (from 1,500 Mcf per day through 3,000 Mcf per day).

(8) Interruptible requirements of more than 3,000 Mcf per day.

The priorities-of-deliveries set forth above will be applied to the deliveries of all jurisdictional pipeline companies during periods of curtailment on each company's system; except, however, that, upon a finding of extraordinary circumstances after hearing initiated by a petition filed under Section 1.7(b) of the Commission's Rules of Practice and Procedure, exceptions to those priorities may be permitted.

The above list of priorities requires the full curtailment of the lower priority category volumes to be accomplished before curtailment of any higher priority volumes is commenced. Additionally, the above list requires both the direct and indirect customers of the pipeline that use gas for similar purposes to be placed in the same category of priority.

The tariffs filed with this Commission should contain provisions that will reflect sufficient flexibility to permit pipeline companies to respond to emergency situations (including environmental emergencies) during periods of curtailment where supplemental deliveries are required to forestall irreparable injury to life or property.

(B) The amendment provided for herein shall be effective as of the date of issuance of this order.

(C) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

[Seal]

Kenneth F. Plumb,
Secretary.

Order No. 467-B.

Order Modifying Order 467, Statement of Policy, and Order Denying Motions for Reconsideration.

(Issued March 2, 1973.)

United States of America, Federal Power Commission.

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr. and Rush Moody, Jr.

Utilization and Conservation of Natural Resources—Natural Gas Act. Docket No. R-469.

On January 8, 1973, the Commission issued Order No. 467 in Docket No. R-469, Statement of Policy, adding Section 2.78(a) to the Commission's Rules of Practice and Procedure, as subsequently amended by Order No. 467-A, January 15, 1973. Numerous applications or petitions for rehearing, reconsideration, modification or clarification of Orders Nos. 467 and 467-A have been filed. Those filing will be termed "Applicants".

In Order No. 467 the Commission issued a policy statement setting forth initial priorities to be followed by jurisdictional pipeline companies during periods of curtailed deliveries. The priorities are based on end use of the gas whether by direct purchase from the pipeline or by indirect purchase through a distributing company. Order No. 467 stated:

> "When applied in specific cases, opportunity will be afforded interested parties to challenge or support this policy through factual or legal presentation as may be appropriate in the circumstances presented."

And the Statement of Policy further provided that exceptions to the prescribed priority system would be permitted upon a finding of extraordinary circumstances after hearing initiated by a petition filed under Section 1.7(b) of the Commission's Rules of Practice and Procedure. Order No. 467-A provided that pipeline companies include provisions in their tariffs permitting them to respond to emergency situations.

The Applicants have made extensive arguments, both procedural and substantive. In a few cases the Applicants requested permission to intervene, and there was one separate Petition for Leave to Intervene (Rochester Gas and Electric Corporation). As discussed below, Order No. 467 is a policy statement and is not intended to initiate a proceeding or to provide a binding rule without further proceedings directed towards curtailment problems on specific pipelines. Therefore petitions to intervene are unnecessary, and petitions for rehearing do not lie. We treat the filings as petitions for reconsideration, and deny the same.

Reasons for Issuance of Orders 467 and 467-A

Since the promulgation of Order 431, 45 FPC 570 (1971), the need for Commission guidance in curtailment planning has become apparent. The curtailment plans proposed by those pipelines which have filed pursuant to Order 431 reflect sharp differences in curtailment philosophy (*e.g.*, curtailment based on end use vs. curtailment based on pro rata reduction of contract entitlements) and curtailment implementation. As a consequence, the hearing records brought before us lack uniformity in the quantum of evidence relating to consumer impact and end use allocation patterns. The articulation and implementation of allocation policies on a uniform national basis are thereby constrained.

Of equal significance, because of the absence of general curtailment guidelines, we have been confronted with emergency situations where emergency action was necessary to prescribe curtailment plans. See Opinion 634 and 634-A, *El Paso Natural Gas Co.*, 48 FPC ...., and Order dated December 20, 1972, *Mississippi River Transmission Co.* In situations where the need to curtail arises suddenly and without anticipation, and where no curtailment plan has been approved, as was true for El Paso and Mississippi River Transmission, the pipeline is placed in the difficult position of undertaking service cutbacks at the risk of civil liability to direct and indirect customers if the curtailments are not required by Commission order, or if the pattern or curtailment is later adjudicated to be unjust or unreasonable. See *International Paper Co. v. F.P.C.*, CA5, No. 71-3531, slip opinion issued February 7, 1973. Similarly, in such situations, pipeline customers and those dependent on pipeline service have no clear basis for conducting their operations.

Finally, our experience with curtailment litigation persuaded us that long-range advance planning by pipelines, distributors, and consumers has been rendered most difficult by the absence of a statement by the Commission of its general policy in curtailment cases.

Because of these considerations, we issued, as a policy statement, Orders 467 and 467-A. We recognized that some flexibility is essential as curtailments first occur, in order to ameliorate the economic dislocations which necessarily ensue, and for that reason we made clear in Order 467 that the policy therein stated could and would, be adjusted in appropriate cases where the hearing record so required.

Procedural and Jurisdictional Arguments

A. *Nature of Order No. 467 and Conformity to the Administrative Procedure Act.*

It is argued by a number of Applicants that Order No. 467, despite its designation as a "Statement of Policy", is really rulemaking and Section 553 of the Administrative Procedure Act requires notice, an opportunity to submit views and to participate. In some cases it is further argued that the action taken by the Commission is actually adjudication rather than rulemaking in that it abrogates or nullifies existing curtailment priorities in contracts and tariffs. On the other hand, Reynolds Metals Company interprets Order No. 467 as not imputing to any pending curtailment case any controlling substantive effects; it asks that Order No. 467 be clarified to state that in each case the opportunity for evidentiary hearings will be afforded. Alabama Gas Corporation asks for clarification as to whether Order No. 467 is a flexible guideline against which curtailment would be judged.

Order No. 467 is designated "Statement of Policy". It specifically states that "When applied in specific cases, opportunity will be afforded interested parties to challenge or support this policy through factual or legal presentation . . ." It therefore falls within the exception for "general statements of policy" within Section 553 of the APA. Our use of Orders 467 and 467-A as policy guidelines is exemplified in *Texas Eastern Transmission Corp., et al.*, Docket Nos. RP71-130, *et al.*, issued January 29, 1973, requiring Algonquin to show cause why it should not file an amendment to its tariff "to conform with Order 467-A".

Orders in Docket R-469 are not finally determinative of the rights and duties of a given pipeline, its customers or ultimate consumers; it expressly envisions further proceedings. As a statement of policy, it is excepted by Section 553 from the requirements of the notice and hearing provisions of the Administrative Procedure Act, and, of course, it is not an adjudication within the meaning of that Act.

B. *Effect on Future Tariff Filings.*

In orders in Docket R-469, we have set forth the form of curtailment plan preferred by the Commission. We have not attempted to impose this plan on all pipelines and their customers, nor have we attempted to delineate all details which should be embodied in proposed tariff changes which propose a curtailment plan. At this time, there is still a need for more flexibility than would be possible were we to insist upon one specific form for all curtailment tariffs.

Accordingly, those pipelines which do not yet have a curtailment plan approved by final order of the Commission are still free to file tariff changes under Section 4 in whatever form they choose. Tariffs not in accord with the policies expressed in orders in Docket R-469 will be subject to suspension and hearing, and any curtailments made under nonconforming tariff sheets which have not received Commission approval may be found to be unjust and unreasonable, or preferential or discriminatory, dependent upon the facts proved in an evidentiary hearing. Proposed tariff sheets which conform to the policies expressed in orders in Docket R-469 will be accepted for filing, and permitted to become effective, subject to the rights of intervenors to hearing and adjudication of any claim of pref-

erence, discrimination, unjustness or unreasonableness of the provisions contained in the proposed tariff sheets, and subject to the further right of any one adversely affected to seek individualized special relief because of extraordinary circumstances. While our present intention is not to suspend tariff sheets which conform to the policies in orders in Docket R-469, we do not foreclose our discretionary powers to suspend such tariff sheets under Section 4(e) under appropriate circumstances.

C. *Effect on Pending Cases.*

Orders in Docket R-469 are not self-operative in pending cases. Initial decision, and Commission decisions, will be reached on the record made, applying orders in Docket R-469 policies except where deviation therefrom is required by the evidence. Where insufficient end use data are not available, we will continue to make appropriate provision for the collection of such data. See, *e.g.*, Opinion No. 634, *El Paso Natural Gas Company;* Opinion No. 643, *Arkansas-Louisiana Gas Company;* Opinion No. 647, *United Gas Pipe Line Company*.

Many Applicants, particularly those representing California, argue that a general rule is inappropriate and that each pipeline system should be treated on an individual basis. With one extremely important exception, we are in general agreement with this thesis, at least at this time in the development of curtailment policies and practices. The one area where we believe uniformity to be essential is with respect to whether contract entitlements should form the basis for curtailment, or whether curtailment should be based on end use factors. As a matter of policy, we have determined that end use

must be controlling. Our reasons for so concluding are articulated in Opinion 643, *Arkla, supra,* and Opinion 647, *United Gas, supra.*

As a Statement of Policy, orders in Docket R-469 will serve as a guide in other proceedings, specifically those arising under Order No. 431. By these orders, the parties are on notice that we consider the type of curtailment plan set forth in the Orders to be just and reasonable, nondiscriminatory and nonpreferential. This does not mean that the parties may not propose or the Commission may not adopt variations on the Sec. 2.78 (a) plan, but there must be evidence in the record to support any such variations. Nor does it mean that adversely affected pipeline customers may not claim a right to special relief from the operation of a Sec. 2.78 (a) plan, but in such instances there must be evidence to support any such claim. In this way, Sec. 2.78 (a) will assist the parties and the Administrative Law Judge in arriving at a curtailment plan which will meet the problems created by diverse needs for gas in the face of a nation-wide gas shortage and at the same time be adapted to the peculiarities, if any, of the particular pipeline system involved.

D. *Control of End Use.*

It is argued that in a curtailment proceeding under Sections 4 and 5 of the Act, the FPC cannot control end use. The Applicants cite *Fuels Research Council v. F.P.C.*, 374 F.2d 842 (CA7, 1967), where it was argued that the Commission should have designed rates to discourage use of gas in power plants, and the Court held the Commission had no such authority. Furthermore, in the *Hope* case,[1] the Court said that it failed to

[1]*F.P.C. vs. Hope Natural Gas Co.,* 320 U.S. 591, 616 (1944).

find in the power to fix just and reasonable rates the power to fix rates which will disallow or discourage resales for industrial use.

The Courts in those cases were not faced with a nationwide gas shortage, and rates were involved, not allocations or curtailments. *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972) confirms the Commission's broad powers to devise effective means of meeting its responsibilities. These include Section 16, providing that the Commission "shall have power to perform any and all acts necessary or appropriate to carry out the provisions" of the Gas Act, and Sections 4 and 5 dealing with rates, service and contracts. Section 4 prohibits any "undue preference or advantage" or any "unreasonable difference" in service, and Section 5 grants the Commission the power to determine "the just and reasonable . . . classification, rule, regulation, practice, or contract to be observed." The Gas Act says (Section 1) "that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest". It is our conclusion that we have ample authority to require that curtailment plans be based on the end use of gas by the direct customers of the pipeline or the customers of the distributing companies.

E. *Requested Clarifications and Modifications.*

Many applicants seek clarification of Order 467 by Commission definition of all terms used, or modification of the substance of Order 467 by a re-ordering of priorities. These Applicants err in treating Orders 467 and 467-A as a rule of substance, which precisely defines the curtailment rights and obligations of all pipelines and all pipeline customers. We ascribe no such

effect to Orders 467 and 467-A, for, as already stated, these Orders are intended only to state initial guidelines as a means of facilitating curtailment planning and the adjudication of curtailment cases.

On the same date Order 467 was issued, we noticed a proposed policy statement in Docket No. R-467, ... F.R. ..... We therein seek comments on stated priorities of service, which priorities the Commission would implement ". . . in all matters arising under the Natural Gas Act." It is not mere coincidence that the priority system noticed in Docket No. R-467 is the same as that set forth in Order No. 467. The comment time has not expired in Docket No. R-467, and we will give due consideration to all comments therein received.

We find it appropriate, however, to modify Section 2.78(a) of our Regulations in one respect, in order to clarify our intent that while end usage of natural gas is controlling in curtailment situations, for the present the immediate impact of curtailment on small volume interruptible users should be lessened, and, for the present, the alternate fuel capabilities of interruptible users should be considered. As already noted, we will, after receipt and consideration of comments in Docket No. R-467, issue such definitions and clarifications of the terms used in determining priorities of service as may be necessary and desirable. One such area of concern will be a useful and workable demarcation between "interruptible" and "firm" service, bearing in mind that these terms are susceptible of differing interpretations. Pending resolution of this matter on the basis of a full record, we modify Section 2.78(a) of our Regulations in the particulars hereinafter stated.

The Commission finds:

(1) The notice and effective date provisions of 5 U.S.C. 553 do not apply with respect to the amendment to the policy statement here adopted.

(2) It is appropriate and in the public interest in administering the Natural Gas Act to adopt the amendment to the policy statement herein ordered.

The Commission, acting pursuant to the provisions of the Natural Gas Act, as amended, particularly Sections 4, 5, 7 and 16 (52 Stat. 822, 824, 825; 56 Stat. 83, 84; 61 Stat. 459; 76 Stat. 72; 15 U.S.C. 717c, 717d, 717f,) *orders:*

(A) Part 2 of the Commission's General Rules of Practice and Procedure, General Policy and Interpretations, Subchapter A, Chapter I, Title 18 of the Code of Federal Regulations is amended by adding a new paragraph at the end of Section 2.78(a) and, as amended, it will read as follows:

"§2.78 Utilization and Conservation of Natural Resources—Natural Gas

(a) The national interests in the development and utilization of natural gas resources throughout the United States will be served by recognition and implementation of the following priority-of-service categories for use during periods of curtailed deliveries by jurisdictional pipeline companies:

(1) Residential, small commercial (less than 50 Mcf on a peak day).

(2) Large commercial requirements (50 Mcf or more on a peak day), firm industrial requirements for plant protection, feedstock and process needs, and pipeline customer storage injection requirements.

(3) All industrial requirements not specified in (2), (4), (5), (6), (7), (8), or (9).

(4) Firm industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

(5) Firm industrial requirements for large volume (3,000 Mcf or more per day) boiler fuel use where alternate fuel capabilities can meet such requirements.

(6) Interruptible requirements of more than 300 Mcf per day, but less than 1,500 Mcf per day, where alternate fuel capabilities can meet such requirements.

(7) Interruptible requirements of intermediate volumes (from 1,500 Mcf per day through 3,000 Mcf per day), where alternate fuel capabilities can meet such requirements.

(8) Interruptible requirements of more than 3,000 Mcf per day, but less than 10,000 Mcf per day, where alternate fuel capabilities can meet such requirements.

(9) Interruptible requirements of more than 10,000 Mcf per day, where alternate fuel capabilities can meet such requirements.

The priorities-of-deliveries set forth above will be applied to the deliveries of all jurisdictional pipeline companies during periods of curtailment on each company's system; except, however, that, upon a finding of extraordinary circumstances after hearing initiated by a petition filed under Section 1.7(b) of the Commission's Rules of Practice and Procedure, exceptions to those priorities may be permitted.

The above list of priorities requires the full curtailment of the lower priority category volumes to be accomplished before curtailment of any higher priority volumes is commenced. Additionally, the above list requires both the direct and indirect customers of the pipeline that use gas for similar purposes to be placed in the same category of priority.

The tariffs filed with this Commission should contain provisions that will reflect sufficient flexibility to permit pipeline companies to respond to emergency situations (including environmental emergencies) during periods of curtailment where supplemental deliveries are required to forestall irreparable injury to life or property.

(B) The amendment provided for herein shall be effective as of the date of issuance of this order.

(C) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

[Seal]

Kenneth F. Plumb,
Secretary.

Supreme Court, U. S.
FILED
OCT 6 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-350

PACIFIC LIGHTING SERVICE COMPANY AND SOUTHERN CALIFORNIA GAS COMPANY,
Petitioners,

No. 75-359

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Petitioners,

v.

FEDERAL POWER COMMISSION, ET AL
Respondent.

On Petitions for a Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

BRIEF OF TRANSWESTERN PIPELINE COMPANY IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

JAMES W. McCARTNEY
2100 First City National
Bank Building,
Houston, Texas 77002

Attorney for Respondent
Transwestern Pipeline Company

October 6, 1975

FIDELITY PRINTING COMPANY, HOUSTON

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

ARGUMENT 2

CONCLUSION 7

APPENDIX A A1-A2

TABLE OF AUTHORITIES

STATUTES:

Natural Gas Act

Section 4 .....passim

Section 5 .....passim

JUDICIAL DECISIONS:

American Louisiana Pipeline Co. v. F.P.C., 344 F.2d 525 (D. C. Cir. 1965) 6

Aberdeen & Rockfish Ry. v. SCRAP, ... U.S. ....., 43 U.S.L.W. 4844 (June 24, 1975) 3

Arrow Transportation Company v. Southern Railway Company, 372 U.S. 658 (1963) 3

FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972) 2, 4, 5, 6

Municipal Light Boards v. F.P.C., 450 F.2d 1341 (D.C. Cir. 1971) 3

United Gas Pipe Line Company v. Mobile Gas Service Corporation, 350 U.S. 332 (1956) 4

United States v. SCRAP, 412 U.S. 669 (1973) 3

FEDERAL POWER COMMISSION DECISIONS:

Transwestern Pipeline Company:

Order Accepting for Filing Tendered Tariff Sheets, Establishing Procedures, and Granting Interventions, FPC Docket No. RP73-101, 49 F.P.C. 1243 (May 31, 1973) 4, 6

In The

Supreme Court of the United States

October Term, 1975

No. 75-350

Pacific Lighting Service Company and
Southern California Gas Company,
Petitioners,

No. 75-359

The People of the State of California and the
Public Utilities Commission of the
State of California,
Petitioners,

v.

Federal Power Commission, et al
Respondent.

BRIEF OF TRANSWESTERN PIPELINE COMPANY IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The facts here are simple. Transwestern filed revised tariff sheets pursuant to the provisions of § 4 of the Natural Gas Act. Such sheets modified Transwestern's terms of service by setting out schedules of priorities to be followed in the event Transwestern's gas supplies became inadequate to satisfy its certificated requirements. Thirty days notice

was given, as required by the Act. When the Commission did not act to suspend, the revised tariff sheets became effective. Upon complaint, the Commission initiated a proceeding, pursuant to the provisions of § 5 of the Act to investigate the justness and reasonableness of the tariff sheets. Petitioners[1] complain of the Commission's failure to initiate a hearing under § 4 of the Act, arguing that it has the effect of shifting the burden of proof. The Ninth Circuit held that the Commission's decision to proceed under § 5 was discretionary, that it could not hold the Commission had abused its discretion and that any complaint with respect to the conduct of the § 5 proceeding could be examined on review of a final order issued therein.

ARGUMENT

Neither the Act nor This Court's Decision in the *Louisiana Power & Light Company* Case Compels the Result Sought by Petitioners

In contending that the Commission was required to conduct hearings under § 4, Petitioners misconceive the structure and mechanics of the Act with respect to the review of rates and tariff changes. Section 4 provides that no change shall be made "except after thirty days' notice to the Commission and to the public". It does not require a hearing. It states merely that upon any such filing, the Commission "shall have authority" to enter upon a hearing concerning the lawfulness of the classification specified in the revised tariff sheets and that pending such

[1] Petitioners, Pacific Lighting Service Company and Southern California Gas Company, are referred to as "Pacific Lighting". Petitioners, The State of California and the Public Utilities Commission of the State of California, are referred to as the "California PUC". General Motors Corporation, which submitted a brief in support of such petitions, is referred to as "GM". Transwestern Pipeline Company is referred to as "Transwestern". Respondent, the Federal Power Commission, is referred to as the "Commission".

hearing and decision the Commission "may suspend" the operation of the tariff sheets for a period no longer than five months beyond the time they would otherwise go into effect. This clearly vests the Commission with discretion. The Ninth Circuit correctly so held.[2]

With respect to tariff sheets which have become effective, the Commission is authorized by § 5 of the Act, on its own motion, or upon complaint, to conduct hearings to determine whether such rates, classifications or practices set forth therein are unjust, unreasonable, unduly discriminatory or preferential and to fix the rates, charges, and classifications to be thereafter observed and enforced. This, the Commission has undertaken to do. The interests of the Petitioners are thus fully protected.[3]

Petitioners complain that the Commission's decision *not* to initiate hearings under § 4 of the Act to review Transwestern's revised tariff sheets is not supported by substantial evidence. This is akin to saying that an evidentiary hearing must be held on each tariff change filing to determine whether a hearing should be held on such filing. Clearly the Act does not impose this requirement on the Commission. Indeed, no substantial evidence question exists. The revised tariff sheets became effective pursuant

[2] It is well established that the determination of whether or not to suspend revised tariff sheets, lawfully filed, is a matter committed solely to the discretion of the Commission with respect to which no right of judicial review exists. *Aberdeen & Rockfish Ry.* v. *SCRAP*, ... U.S. ....., 43 U.S.L.W. 4844, (June 24, 1975); *United States* v. *SCRAP*, 412 U.S. 669 (1973); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963); *Municipal Light Boards* v. *F.P.C.*, 450 F.2d 1341 (D.C. Cir. 1971). Confronted with this authority, Petitioners and GM are careful to disclaim any intent to seek review of the Commission's action in not suspending Transwestern's revised tariff sheets. (See Pacific Lighting petition, p. 24; GM Brief, p. 2).

[3] Whether the Commission could permit revised tariff sheets setting forth curtailment plans to go into effect over objection without hearing under either § 4 or § 5 of the Act is not at issue here.

to the operation of § 4 of the Act, not the Commission's May 31, 1973 order.[4]

As this Court held in *Mobile*,[5] § 4 of the Act is self-executing. It requires only that "notice" of tariff changes be given by natural gas companies. Unless the Commission acts, the change becomes effective pursuant to the provisions of the Act. Specifically, the Court stated:

> "Section 4(d) provides not for the filing of 'proposals' but for *notice* to the Commission of any 'change . . . made by' a natural gas company, and *the change is effected if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action.* If the purported change is one the natural gas company has the power to make, the 'change' is completed upon compliance with the notice requirement and the new rate has the same force as any other rate — it can be set aside only upon being found unlawful by the Commission." (emphasis supplied) 350 U.S. at 342.

While Transwestern's revised tariff sheets set forth changed conditions of service in a manner consistent with the Commission's Statements of General Policy, Transwestern had the power to make such tariff filings had such policy statements never issued. The Commission was likewise free, under § 4 of the Act and without regard to its Statements of General Policy, to decline to suspend or enter upon a hearing with respect to Transwestern's revised tariff sheets. Petitioners' complaints about

[4] Pacific Lighting undertakes to seize upon a statement in the Commission's brief below to the effect that the May 31, 1973 order, permitting Transwestern's revised tariff sheets to go into effect, was supported by substantial evidence. (See PL Petition, p. 12-19). This statement was corrected by Commission counsel on oral argument. Excerpts from the Reporter's transcript of the proceedings are set forth in Appendix A to this Brief.

[5] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

the Commission acting pursuant to its statements of policy in Orders Nos. 431, 467, 467-A, and 467-B are thus beside the point.

Nor does this Court's decision in *F.P.C.* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972) support Petitioners. The Court did not purport to write § 5 out of the Act as a review vehicle for curtailment plans. To the contrary, it emphasized the "broad powers" and "flexibility" which the Commission had under the Act to implement curtailment plans. In this respect, the Court stated:

> "Since curtailment programs fall within FPC's responsibilities under the head of its 'transportation' jurisdiction, the Commission must possess broad powers to devise effective means to meet these responsibilities. FPC and other agencies created to protect the public interest must be free, 'within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.' " 406 U.S. at 642.

The Court does not hold or intimate at any point in its decision that hearings on revised tariff sheets setting forth curtailment priorities *must* be conducted under § 4 of the Act. Rather, it recognizes specifically the Commission's authority to review curtailment plans under § 5 of the Act, stating that in such hearings the Commission would have "emergency authority to issue interim orders effecting a curtailment plan", 406 U.S. at 644, n. 18, and further, that when the public interest required, the Commission could accept the filing and "implement it immediately". 406 U.S. at 645.

In permitting Transwestern's filing to take effect immediately and initiating a hearing under § 5 of the Act pursuant to the complaint of the California PUC, the Commission was exercising the "broad powers" to which this

Court referred and was acting within the scope of its discretion and authority. Moreover, to the extent it has placed the burden of proof on petitioners to support their complaints and objections to Transwestern's curtailment plan, it has acted in entirely "pragmatic" manner.[6]

As the Commission's May 31, 1973 Order states, Transwestern's revised tariff sheets set forth curtailment procedures solely with respect to its CDQ Rate Schedules. It has only two purchasers under these rate schedules, Pacific Lighting Service Company and Cities Service Gas Company. Sales to these customers account for approximately 99% of its total sales volume (see PL Petition, Appendix p. 7). Unlike United in the *LP&L* case, Transwestern makes no direct sales of significant volumes. It has no "unique knowledge of its customers' needs, ability to substitute other fuel sources or other relevant [customer-related] considerations" (*Louisiana Power & Light Co.*, 406 U.S. at 645). It has no control over the disposition of the volumes which it sells to Pacific Lighting and Cities Service and has no knowledge, other than that furnished by such parties, of how volumes sold by it are used. It would be required to rely on data made available by Petitioners and Cities Service in any proceeding reviewing its revised tariff sheets and any presentation it might make with respect to the end-use of such volumes would, of necessity, be based on facts provided by these parties and not from any knowledge of its own.

Under these circumstances, the Commission acted within the scope of its statutory authority and discretion in

[6] This assumes that in a hearing under § 4 of the Act, Transwestern would have the burden of proof. While there is dictum in the *LP&L* case supporting this contention, the Act does not so provide. *Cf. American Louisiana Pipeline Co.* v. *F.P.C.*, 344 F.2d 525 (D. C. Cir. 1965).

requiring the parties having the facts to support their complaints. Those who assert that their peculiar circumstances make the general orders of priority approved by the Commission and incorporated in Transwestern's revised tariff sheets unreasonable, discriminatory or preferential should have the burden of establishing the facts which support their conclusion. This is all the Commission has undertaken to do. Contrary to Pacific Lighting's complaint that the Commission has "shifted" the burden of proof, it has simply placed it where it properly belongs.

The Commission's action was correct. The Ninth Circuit's decision was correct. Petitioners are fully protected, as a practical matter, by the proceedings which the Commission has initiated under § 5 of the Act. The burden of proof was properly placed on the parties attacking the tariff sheets in effect pursuant to the mechanics of the Act and having access to the information.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

JAMES W. MCCARTNEY
2100 First City National
Bank Building,
Houston, Texas 77002

Attorney for Respondent
Transwestern Pipeline Company

APPENDIX A

EXCERPTS FROM TRANSCRIPT OF ORAL ARGUMENT BEFORE THE NINTH CIRCUIT HELD ON APRIL 3, 1975

Appearances:

For Petitioner Pacific Lighting Service Company and Southern California Gas Company:
THOMAS D. CLARKE, ESQ.
720 West Eighth Street
Los Angeles, California 90017

For Petitioner Southern California Edison Company:
ROLLIN E. WOODBURY, ESQ.
2244 Walnut Grove Avenue
Rosemead, California 91770

For Petitioners Public Utilities Commission and State of California:
LAWRENCE Q. GARCIA, ESQ.
State Building
450 McAllister Street
San Francisco, California 94102

For Respondent Federal Power Commission:
OFFICE OF THE GENERAL COUNSEL
By: JOHN STAFFIER, ESQ.
825 North Capitol Street NE
Washington, D.C. 20426

For Respondent Transwestern Pipeline Company:
VINSON, ELKINS, SEARLS, CONNALLY & SMITH
By: JAMES W. MCCARTNEY, ESQ.
First City National Bank Building
1021 Main Street
Houston, Texas 75002

• • •

MR. STAFFIER: I would like to make one thing clear here. I am afraid in rereading our brief there may have been some confusing statements in there. First of all, the Commission did not find that the Transwestern curtailment plan was just and reasonable because it conformed with Order 467. That would have been improper because 467 was not a Rule and, therefore, does not provide evidence upon which to make a finding of justice [sic] and reasonableness. That is exactly not what they did. All they did is say that it conformed to 467 and therefore we are going to exercise our discretion not to suspend it and not to embark upon a Section 4 hearing. It was not a finding of justness and reasonableness, and there is no need for substantial evidence. (Tr. 30-31).

• • •

MR. STAFFIER: Before the Commission could make any finding with regard to the justness and reasonableness of a conforming plan such as Transwestern's, everybody would have the opportunity to be heard because it would not make that finding until after the completion of the Section 5 hearing. You see, there is the [sic] requirement that the Commission find a file [sic] tariff to be just and reasonable when it is filed, and it did not do so here. It didn't purport to find this claim [sic] to be just and reasonable. (Tr. 33).

Nos. 75-350 and 75-359

Supreme Court, U. S.
FILED
NOV 6 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

PACIFIC LIGHTING SERVICE COMPANY AND SOUTHERN CALIFORNIA GAS COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF CALIFORNIA, PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

DREXEL D. JOURNEY,
General Counsel,

ROBERT W. PERDUE,
Deputy General Counsel,

ALLAN ABBOT TUTTLE,
Solicitor,

SCOTT M. DUBOFF,
Attorney,
Federal Power Commission,
Washington, D.C. 20426.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Argument	5
Conclusion	11

CITATIONS

Cases:

Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402	10
Federal Power Commission v. *Louisiana Power & Light Co.*, 406 U.S. 621	5, 6, 7
Municipal Light Boards v. *Federal Power Commission*, 450 F. 2d 1341, certiorari denied, 405 U.S. 989	8-9
Pennsylvania Gas & Water Co. v. *Federal Power Commission*, 463 F. 2d 1242	7
United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332	9

Statutes:

Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*:	
Section 4, 15 U.S.C. 717c	5, 7, 8, 9
Section 4(d), 15 U.S.C. 717c(d)	3, 9
Section 4(e), 15 U.S.C. 717c(e)	3, 4, 5, 6, 8, 10

Statutes—Continued Page

Section 5, 15 U.S.C. 717d 4, 5, 7, 8, 10
Section 5(a), 15 U.S.C. 717d(a) 6
Section 19(b), 15 U.S.C. 717r(b) 10

5 U.S.C. 706(2)(A) 10
5 U.S.C. 706(2)(E) 10

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-350

PACIFIC LIGHTING SERVICE COMPANY AND SOUTHERN CALIFORNIA GAS COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION

No. 75-359

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF CALIFORNIA, PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-5)[1] is not reported. The initial order of the Fed-

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 75-350.

eral Power Commission (*id.* at 6-9) and its order denying rehearing and reconsideration (*id.* at 10-14) are reported at 49 FPC 1243 and 50 FPC 343. The Commission's order denying a motion to vacate (*id.* at 15-17) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1975 (*id.* at 1). Petitions for rehearing were denied on June 9, 1975 (*id.* at 18). Petitions for a writ of certiorari were filed on September 5 and 6, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the court of appeals correctly determined that the Federal Power Commission did not abuse its discretion in declining to institute a hearing under Section 4(e) of the Natural Gas Act, and instead instituting a hearing under Section 5(a) of the Act, to review the lawfulness of a pipeline's curtailment plan.

STATUTES INVOLVED

The relevant provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, are set forth at Pet. App. 19-24.

STATEMENT

In April 1973, Transwestern Pipeline Company, anticipating an inadequate supply of natural gas to

meet all of its customers' demands, tendered for filing with the Federal Power Commission under Section 4(d) of the Natural Gas Act, 15 U.S.C. 717c(d), revisions of its natural gas tariff, to take effect on June 1, 1973, establishing procedures for the curtailment of deliveries in the event of deficient supply. The Commission determined (Pet. App. 8) that "the Transwestern filing reflects priorities for curtailment consistent with our Statement of Policy" on curtailment priorities for pipelines.[2] Although several intervenors (petitioners in No. 75-350) requested the Commission to invoke its authority under Section 4(e) of the Act, 15 U.S.C. 717c(e), to suspend the operation of the tendered tariff revisions for the maximum five-month period and to institute a hearing concerning their lawfulness, the Commission, stating that "no specific grounds are stated in support of the requested suspension" (Pet. App. 8), ordered that the revisions be accepted for filing and declined to suspend their operation or to order a hearing under Section 4(e) (*id.* at 8-9). At the same time, the Commission authorized all the petitioners herein, customers of Transwestern, to intervene in the proceeding, and it stated that each could "file a petition for extraordinary relief from application of the filed curtailment plan or file a complaint under Section 5(a) of the Natural Gas Act, if [its] objections re-

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[2] The Statement of Policy, Order No. 467, is set forth at Pet. App. 31-37. Subsequent amendments to that order are set forth at Pet. App. 38-53.

late instead to systemwide aspects of the curtailment plan" (*id.* at 8).

Petitioners filed applications for rehearing reiterating their request that the Commission order a hearing under Section 4(e) of the Act prior to permitting Transwestern's plan to become effective. The Commission determined that, since petitioners' "concern appears to be directed more to their position on the [curtailment] priority scale than [to] * * * the impropriety of the priorities themselves[,] * * * the need to initiate a Section 4 hearing to determine the lawfulness of the priorities *per se* has not been demonstrated" (*id.* at 11). While the Commission accordingly denied rehearing, it determined that "[t]he pleadings present issues that, in our judgment, should be adjudicated on the basis of an evidentiary record" (*ibid.*). It therefore construed California's[3] application for rehearing as a complaint filed under Section 5 and ordered the commencement of a hearing under that Section, in which "California, as complainant may have the opportunity to present evidence to sustain its burden of showing" that the curtailment plan ~~its burden of showing" that the curtailment plan~~ unduly discriminates against California's customers or that the plan's priorities should be altered in certain respects (*id.* at 11-12).[4]

[3] "California" refers to petitioners in No. 75-359.

[4] The Commission thereafter stayed commencement of the Section 5 hearing in order to permit petitioners to seek judicial review of the Commission's orders (Pet. App. 15-17).

The court of appeals dismissed petitions for review of the Commission's orders (*id.* at 2-5). The court held that "the holding of hearings under [Section 4 of the Act is] discretionary rather than mandatory" and that the Commission did not abuse its discretion "on the facts before it in these cases" in ordering, instead, hearings under Section 5 (*id.* at 4). "The Commission's choice of § 5 as the hearing format for evaluation of objections to Transwestern's curtailment plan does shift the burden of proof,[5] but does not necessarily deprive the petitioners of a full and fair opportunity to present facts bearing upon the reasonableness of the curtailment priorities" (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

Petitioners argue that the Commission was required to order a hearing under Section 4(e) of the Act on the lawfulness of Transwestern's tariff revisions before permitting them to become effective, that the Commission's determination to hold a Section 5 hearing instead of a Section 4 hearing unlawfully shifts the burden to them to show that the tariff revisions are unjust and unreasonable, and that permit-

[5] In a hearing instituted by the Commission under Section 4(e), unlike a hearing instituted under Section 5(a), "the pipeline has the burden of proving that its plan is reasonable and fair" (*Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 645).

ting the tariff revisions to become effective was improper because the action is not supported by substantial evidence. Those arguments misconceive the structure of the Act.

1. As this Court stated in *Federal Power Commission* v. *Louisiana Power & Light Co.*, *supra*, the Act provides "[t]wo procedural mechanisms" (406 U.S. at 643) by which the Commission may review the lawfulness of a curtailment plan. When the plan is tendered for filing, the Commission, under Section 4(e), "may suspend the amended tariff for up to five months, at the end of which time the amended tariff becomes effective pending the completion of hearings" (*id.* at 645). Alternatively, the Commission may allow the plan to take effect and, upon a complaint or on its own motion, institute a hearing under Section 5(a). If, under either procedure, the Commission determines that the plan "is unjust, unreasonable, unduly discriminatory, or preferential," it may fashion a lawful plan and order its implementation (15 U.S.C. 717d(a); see also 15 U.S.C. 717c(e)).

Petitioners contend that the Commission was required to order a hearing under Section 4(e) before permitting the tariff revisions to become effective. Section 4(e) authorizes but does not compel the Commission to order a hearing prior to a plan's effectiveness. It provides that "the Commission shall have authority * * * to enter upon a hearing * * *." "Section 4(e) merely defines the power of the Commis-

sion; it *does not require* the FPC either to suspend a rate or to hold a hearing without suspension at the behest of a customer" (*Pennsylvania Gas & Water Co.* v. *Federal Power Commission*, 463 F. 2d 1242, 1245 (C.A. D.C.) (emphasis in original)).

Nothing in this Court's opinion in *Louisiana Power & Light* suggests the contrary. The Court there held that the Commission *may* properly proceed under Section 4 rather than Section 5. In explaining why the Commission had "chosen to process curtailment plans under §§ 4(c), (d), and (e)" (406 U.S. at 644), the Court noted the "substantial disadvantages" (*id.* at 643), from the standpoint of the public interest rather than the interest of private litigants, of the Section 5 procedure. It recognized, however, that both "procedural mechanisms are available" (*ibid.*).

The court of appeals here correctly held that the circumstances of this case justified the Commission's determination to proceed under Section 5 rather than Section 4. As the Commission stated (Pet. App. 11), petitioners' objections to Transwestern's curtailment plan related not so much to its unlawfulness *per se* but rather to the particular impact its priorities would have on petitioners' customers. The Commission reasonably concluded that those particularized complaints, while calling for "adjudicat[ion] on the basis of an evidentiary record" (*ibid.*), could most appropriately be considered in a Section 5 proceeding, in which petitioners would have an opportunity

to demonstrate the alleged discriminatory impact of the plan on their customers.

2. That the burden of proof in such a proceeding falls on the complaining parties rather than on the pipeline does not invalidate the Commission's choice. That consequence follows under the terms of the statute whenever the Commission elects to proceed under Section 5 instead of Section 4. If, as we have shown, the Commission has discretion to make that election, its choice can hardly be challenged on the ground that the statute thereby places the burden of proof on a different party. What is important, as the court of appeals correctly stated, is that petitioners are accorded "a full and fair opportunity to present facts bearing upon the reasonableness of the curtailment priorities" (Pet. App. 4). Any complaint that petitioners may have concerning the conduct of the hearing may, of course, be made the subject of judicial review after the Commission reaches a decision based upon the hearing record.

3. Petitioners argue that the Commission's order in this case—which accepted Transwestern's tariff revision for filing, declined to suspend the operation of the curtailment plan, and declined to order a hearing under Section 4(e)—is not supported by substantial evidence. The Commission could have rejected the plan for filing if it had been "patently * * * either deficient in form or a substantive nullity" (*Municipal Light Boards* v. *Federal Power Commission*, 450 F. 2d 1341, 1345 (C.A. D.C.), certiorari denied, 405

U.S. 989). Petitioners do not contend that Transwestern's plan should have been rejected under that standard. Nor do they seek review of the Commission's determination not to suspend the operation of the plan (see Pet. No. 75-350, p. 24), for "it is settled that the refusal to suspend a filed rate is a nonreviewable exercise of agency discretion" (*Municipal Light Boards* v. *Federal Power Commission*, *supra*, 450 F. 2d at 1351).

Petitioners claim only that the Commission should have ordered a Section 4 hearing before allowing the plan to become effective. A tariff revision accepted for filing with the Commission under Section 4(d) of the Act, however, becomes effective, not because of any Commission action ordering its effectiveness, but by operation of the statute. As this Court stated in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 342:

> Section 4(d) provides not for the filing of "proposals" but for notice to the Commission of any "change . . . made by" a natural gas company, and the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action. If the purported change is one the natural gas company has the power to make, the "change" is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission. * * * Likewise, no "proceeding" is "initiated" by a

> § 4(d) filing. A proceeding to review the new rate may be initiated under § 4(e), but, if so, it is initiated by the Commission * * *.

To the extent that petitioners seek to challenge the curtailment plan on the merits, therefore, the proper procedure is to present their evidence and arguments in the Section 5 hearing that the Commission has instituted and (if necessary) to seek judicial review of the Commission's final decision. The Commission's findings in that proceeding will be subject to review under the substantial evidence standard. See Section 19(b) of the Act, 15 U.S.C. 717r(b).

The Commission's determination not to institute a Section 4(e) hearing, however, if it is reviewable at all, may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706(2)(A)). Since the decision *whether* to institute a Section 4(e) hearing obviously is not required itself to be "based on a public adjudicatory hearing" (*Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 414), review under the substantial evidence standard is not authorized. See 5 U.S.C. 706(2)(E).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DREXEL D. JOURNEY,
General Counsel,

ROBERT W. PERDUE,
Deputy General Counsel,

ALLAN ABBOT TUTTLE,
Solicitor,

SCOTT M. DUBOFF,
Attorney,
Federal Power Commission.

NOVEMBER 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 596369 100

Supreme Court, U. S.
FILED
SEP 26 1975
MICHAEL RODAK, JR., CLERK

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Petitioners

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT GENERAL MOTORS CORPORATION IN SUPPORT

EDWARD J. GRENIER, JR.
RICHARD P. NOLAND
FLOYD I. ROBINSON

SUTHERLAND, ASBILL & BRENNAN
1666 K Street, N.W.
Washington, D.C. 20006

Attorneys for General Motors Corporation

Of Counsel:

FRAZER F. HILDER
General Counsel

WILLIAM A. VAUGHAN
GENERAL MOTORS CORPORATION
3044 West Grand Boulevard
Detroit, Michigan 48202

September 26, 1975

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	2
SUPPLEMENTAL STATEMENT OF THE CASE	2
SUMMARY OF POSITION	4
REASONS FOR GRANTING THE WRIT	6
1. The Differences Between a Section 4(e) Hearing and a Section 5(a) Hearing Are Substantial ...	6
2. Whenever a Formal Complaint Is Lodged with the Commission under § 4(e) Raising Serious Questions Regarding the Justness and Reasonableness of a Proposed Tariff Change Filed by a Pipeline under § 4(d), the Commission Is Required To Conduct a Full Hearing under § 4(e) on the Proposal and To Hold the Pipeline to its Burden of Proof in § 4(e)	10
3. The Opinion of the Court of Appeals, if not Reversed by this Court, Will Have a Substantial Detrimental Impact on the Effectiveness of the Protection Afforded to Consumers by the Natural Gas Act, as Well as Similar Statutes, and Will Cause Serious Practical Problems in the Case at Bar	13
CONCLUSION	17

TABLE OF AUTHORITIES

STATUTES:

Administrative Procedure Act
Section 7(c), 5 U.S.C. § 556(d) (1967) 9, 11

Communications Act of 1934
Section 204, 47 U.S.C. § 204 (1962) 16
Section 205, 47 U.S.C. § 205 (1962) 16

Page

Federal Aviation Act
Section 1002(d), (f), (g), (h); 49 U.S.C. § 1482-(d), (f), (g), (h) (1963) 16

Federal Power Act
Section 205(e), 16 U.S.C. § 824d(e) (1974) 16
Section 206(a), 16 U.S.C. § 824e(a) (1974) 16

Interstate Commerce Act
Part I:
Section 15(1), 49 U.S.C. § 15(1) (1959) 8, 16
Section 15(7), 49 U.S.C. § 15(7) (1959) 8, 16
Part II (Motor Carrier Act):
Section 216(f), (g); 49 U.S.C. § 316(f), (g) (1963) 16
Section 218(b), (c); 49 U.S.C. § 318(b), (c) (1963) 16
Part III (Water Carrier Act):
Section 307(d)-(i), 49 U.S.C. § 907(d)-(i) (1963) 16
Part IV (Freight Forwarders Act):
Section 406(b), (e); 49 U.S.C. § 1006(b), (e) (1963) 16

Natural Gas Act
Section 4(a), 15 U.S.C. § 717c(a) (1970) 11
Section 4(c), 15 U.S.C. § 717c(c) (1970) 6
Section 4(d), 15 U.S.C. § 717c(d) (1970) .....*passim*
Section 4(e), 15 U.S.C. § 717c(e) (1970) .....*passim*
Section 5(a), 15 U.S.C. § 717d(a) 1970) .....*passim*
Section 19(b), 15 U.S.C. § 717r(b) (1970) 4, 11, 12

JUDICIAL DECISIONS:

American Smelting and Refining Company v. *FPC*, 494 F.2d 925 (D.C. Cir.), *cert. denied, Southern California Gas Company* v. *FPC*, 419 U.S. 882 (1974) 7
Arkansas Power & Light Company v. *FPC*, — F.2d —, Nos. 73-1637 et al. (D.C. Cir. August 21, 1975) 15
Arrow Transportation Company v. *Southern Railway Company*, 372 U.S. 658 (1963) 2
Atlanta Gas Light Company v. *FPC*, 476 F.2d 142 (5th Cir. 1973) 6

Page

Atlantic Refining Company v. *Public Service Commission of New York (CATCO)*, 360 U.S. 378 (1959) 13
Cities of Canton, Cleveland, and Massillon v. *FPC*, 360 F.2d 521 (D.C. Cir. 1966) 16
Citizens for Allegan County, Inc. v. *FPC*, 414 F.2d 1125 (D.C. Cir. 1969) 10
Consolidated Edison Company of New York v. *FPC*, 511 F.2d 372 (D.C. Cir. 1974) 15
FPC v. *Hope Natural Gas Company*, 320 U.S. 591 (1944) 13
FPC v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972) 6, 7
FPC v. *Sierra Pacific Power Company*, 350 U.S. 348 (1956) 11
FPC v. *Tennessee Gas Transmission Company*, 371 U.S. 145 (1962) 13
FPC v. *Texaco Inc.*, 417 U.S. 380 (1974) 7
FPC v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1 (1961) 13
Michigan Power Company v. *FPC*, 494 F.2d 1140 (D.C. Cir. 1974) 6
Mississippi River Fuel Corporation v. *FPC*, 202 F.2d 899 (3d Cir.), *cert. dismissed*, 345 U.S. 988 (1953) 12
Municipal Light Boards of Reading and Wakefield, Massachusetts v. *FPC*, 450 F.2d 1341 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972) 12
Natural Gas Pipeline Company v. *FPC*, 253 F.2d 3 (3d Cir.), *cert. denied, Dorchester Corporation* v. *Natural Gas Pipeline Company*, 357 U.S. 927 (1958) 11
Pacific Gas and Electric Company v. *FPC*, 506 F.2d 33 (D.C. Cir. 1974) 4, 5, 7, 15
Panhandle Eastern Pipe Line Company v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947) 13
Pennsylvania Gas and Water Co. v. *FPC*, 463 F.3d 1242 (D.C. Cir. 1972) 10
Shell Oil Company v. *FPC*, 334 F.2d 1002 (3d Cir. 1964) 11

Page

State Corporation Commission of Kansas v. *FPC*, 206 F.2d 690 (8th Cir. 1953), *cert. denied*, 346 U.S. 922, *rehearing denied*, 347 U.S. 1022 (1954) 7

State of Louisiana v. *FPC*, 503 F.2d 844 (5th Cir. 1974) 15

Texas & Pacific Railway Company v. *Abilene Cotton Oil Company*, 204 U.S. 426 (1907) 8

Texas & Pacific Railway Company v. *Cisco Oil Mill*, 204 U.S. 449 (1907) 8

United Gas Pipe Line Company v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956) 11

FEDERAL POWER COMMISSION DECISIONS:

Transwestern Pipeline Company:

Notice of Proposed Changes in FPC Gas Tariff, FPC Docket No. RP73-101 (May 4, 1973) 3

Order Accepting for Filing Tendered Tariff Sheets, Establishing Procedures, and Granting Interventions, FPC Docket No. RP73-101, 49 F.P.C. 1243 (May 31, 1973) 3

Order Denying Rehearing and Reconsideration, Instituting Complaint Proceeding, and Establishing Procedures, FPC Docket No. RP73-101, 50 F.P.C. 343 (Aug. 1, 1973) 3

Utilization and Conservation of Natural Resources—Natural Gas Act:

Order No. 467-B, Order Modifying Order 467, Statement of Policy, and Order Denying Motions for Reconsideration, FPC Docket No. R-469, 49 F.P.C. 583 (March 2, 1973), 18 C.F.R. § 2.78(a) (1974) ..... *passim*

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BRIEF FOR RESPONDENT GENERAL MOTORS CORPORATION IN SUPPORT

Respondent, General Motors Corporation ("General Motors"), through its Counsel, hereby files its Brief in support of the Petitions for a writ of certiorari filed before this Court by Pacific Lighting Service Company and Southern California Gas Company on September 5, 1975, and by the People of the State of

California and the Public Utilities Commission of the State of California on September 6, 1975, and respectfully prays that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered on April 25, 1975, in *Pacific Lighting Service Company et al.* v. *FPC*, —— F.2d ——, Nos. 73-2538 et al.

QUESTION PRESENTED

When a pipeline company files a proposed tariff change pursuant to § 4(d) of the Natural Gas Act, and customers of the pipeline lodge formal complaints under § 4(e) raising serious questions regarding the justness and reasonableness of the proposal, and no evidence whatsoever exists either for or against the proposed change, is the Federal Power Commission required to hold a hearing under § 4(e), in which the pipeline has the burden to prove the proposal just and reasonable, or does the Commission have discretion under § 4(e) to accept and make effective the proposed tariff and subsequently to conduct a hearing under § 5(a), thereby assigning the burden of proof to the complainants?[1]

SUPPLEMENTAL STATEMENT OF THE CASE

General Motors accepts the Statements of the Case as set forth by the Petitioners, with one important addition. Promptly following the issuance, on May 4,

[1] This case does not involve a closely-related question, often raised in the past, regarding the Commission's suspension powers under § 4(e). It is well-settled that the Commission's exercise of its suspension power is discretionary. *Arrow Transportation Company* v. *Southern Railway Company*, 372 U.S. 658 (1963). The question raised in this case concerns the Commission's duty to hold hearings under § 4(e).

1973, of public notice[2] of the new curtailment plan proposed by Transwestern Pipeline Company ("Transwestern"), several of Transwestern's customers, both direct and indirect, filed complaints specifically requesting that the Commission order formal hearings on the justness and reasonableness of Transwestern's proposal.[3] These formal complaints were timely-filed under § 4(e) prior to the May 22, 1973, deadline date established by the Commission's Notice, and prior to the Commission's May 31, 1973, Order[4] under review accepting Transwestern's proposed tariff sheets and permitting the new curtailment plan to go into effect without hearings under § 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e) (1970). In applications for rehearing[5] of the May 31 Order, these same parties once again raised serious questions regarding the justness and reasonableness of the proposal prior to the issuance of the second Order under review issued on August 1, 1973.[6]

[2] Notice of Proposed Changes in FPC Gas Tariff, *Transwestern Pipeline Co.*, FPC Docket No. RP73-101 (May 4, 1973). (J.A. 21-22).

[3] Complaints were filed by the following parties: San Diego Gas & Electric Company (on May 18); Pacific Lighting Service Company and Southern California Gas Company, jointly (on May 22); and Southern California Edison Company (on May 22). (J.A. 25, 32).

[4] Order Accepting for Filing Tendered Tariff Sheets, Establishing Procedures, and Granting Interventions, *Transwestern Pipeline Co.*, FPC Docket No. RP73-101, 49 F.P.C. 1243 (May 31, 1973).

[5] J.A. 34-54. In addition, two parties filed applications after the thirty-day deadline but prior to the Commission's Order on Rehearing of August 1, 1973. (J.A. 55-70).

[6] Order Denying Rehearing and Reconsideration, Instituting Complaint Proceeding, and Establishing Procedures, *Transwestern Pipeline Co.*, FPC Docket No. RP73-101, 50 F.P.C. 343 (Aug. 1, 1973). (J.A. 70-76).

SUMMARY OF POSITION

Respondent, General Motors, operates various manufacturing facilities throughout the United States. Seven of these facilities consume substantial volumes of natural gas obtained from gas distribution companies served at least in part through the Transwestern system. Four of these plants are located in California, two are in Kansas, and one is in Missouri. Much of the natural gas consumed in these plants is used in industrial processing operations for which natural gas is the only practicable fuel, and thus General Motors is vitally concerned with the curtailment plan implemented by Transwestern.

General Motors firmly supports the position of Petitioners that the Orders of the Federal Power Commission under review are totally unsupported by any evidence, much less substantial evidence of record as required by § 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b) (1970). Indeed, it is only too obvious that the new curtailment plan proposed by Transwestern and approved by the Commission in this case was engendered not by an adjudicatory record (since no hearings have ever been held), but solely by the Commission's so-called Order No. 467-B,[7] which shortly following the issuance of the two Orders under review, was held to be not an "order" at all but a mere policy statement having no substantive effect. *Pacific Gas and Electric Company* v. *FPC*, 506 F.2d 33, 40-44 (D.C. Cir. 1974). General Motors also agrees with Petitioners that the decision of the Court of Appeals below

[7] Order No. 467-B, Order Modifying Order 467, Statement of Policy, and Order Denying Motions for Reconsideration, *Utilization and Conservation of Natural Resources—Natural Gas Act*, FPC Docket No. R-469, 49 F.P.C. 583 (March 2, 1973); codified in 18 C.F.R. § 2.78(a) (1974).

is in clear conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Pacific Gas, supra.* In that case, the District of Columbia Circuit made it abundantly clear to the Commission that it could not apply Order 467-B in individual curtailment proceedings without first scheduling hearings under § 4(e) of the Natural Gas Act. 506 F.2d at 40-43. In the instant case, however, the Commission brushed aside Petitioners' (and others') requests that § 4(e) hearings be held on Transwestern's Order 467-B curtailment plan, and it scheduled limited hearings only under § 5(a), and then only after it permitted Transwestern's new plan to become effective on a final basis as a permanent plan. The Court below was fundamentally in error when it characterized the Commission's approval of Transwestern's proposed curtailment plan as merely "provisional," pending the outcome of the § 5(a) hearing.[8]

Because the decision of the Court of Appeals for the Ninth Circuit, for which Petitioners seek a writ of certiorari, affirms the Commission's Orders in this case, the decision—despite its brevity—raises serious questions regarding the efficacy of the protection afforded to consumers by the Natural Gas Act. The novel procedure employed by the Commission in this case permitted a totally unproven curtailment plan to go into effect on Transwestern's system as a final plan without hearings over numerous timely-filed protests of Transwestern's customers. At the very least, the Commission should have permitted Transwestern's proposed plan to go into effect pending hearings on its justness and reasonableness under § 4(e) of the Natural Gas Act, in which the plan's proponent, Trans-

[8] Pacific Lighting Serv. Co. et al. v. FPC, — F.2d —, Nos. 73-2538 et al. (9th Cir. April 25, 1975), slip op. at 2-3.

western, would have borne the burden of proof. Instead, the Commission, after the plan went into effect, scheduled hearings only under § 5(a), in which the consumers opposing the plan would bear the burden of proof. If the decision of the Court of Appeals is not reversed by this Court, it will create a major gap in the procedural safeguards afforded to consumers not only by the Natural Gas Act but also by similar regulatory statutes.

REASONS FOR GRANTING THE WRIT

I. The Differences Between a Section 4(e) Hearing and a Section 5(a) Hearing Are Substantial.

As this Court recently noted in *FPC* v. *Louisiana Power & Light Company,* 406 U.S. 621, 643 (1972), the Natural Gas Act, 15 U.S.C. §§ 717 et seq. (1970), provides two procedural mechanisms—§ 4(c), (d), and (e) and § 5(a)—for the evaluation of curtailment plans. The Court also noted that "[t]he § 5(a) procedure has substantial disadvantages, however, *rendering it unsuitable for the evaluation of curtailment plans.*" (emphasis added). 406 U.S. at 643.[9] The two reasons given by the Court were: (1) that the Commission can take no remedial action under § 5(a) until after completion of a full hearing on a curtailment plan, and (2) that a remedial order issued under § 5(a) can have prospective application only. 406 U.S. at 643-44.

General Motors respectfully submits that the facts of this case illustrate yet another reason why § 4(e) provides appropriate procedures for the evaluation

[9] *Accord,* Michigan Power Co. v. FPC, 494 F.2d 1140, 1144 (D.C. Cir. 1974); Atlanta Gas Light Co. v. FPC, 476 F.2d 142, 148 (5th Cir. 1973).

of curtailment plans proposed by jurisdictional pipeline companies, while § 5(a) does not. As stated in the last sentence of § 4(e), "the *burden of proof* to show that the increased rate or charge is just and reasonable *shall be upon the natural-gas company,* . . ." (emphasis added). In *FPC* v. *Louisiana Power & Light Company, supra,* this Court interpreted this provision to mean that, when a curtailment plan (rather than a rate increase) is proposed by a pipeline company under § 4, the ". . . pipeline has the burden of proving that its plan is reasonable and fair." 406 U.S. at 646. *Accord, Pacific Gas and Electric Company* v. *FPC,* 506 F.2d 33, 43 (D.C. Cir. 1974). Under § 5(a), however, the burden of proof normally is shifted to the party attacking a tariff.[10]

The assignment of the burden of proof in administrative proceedings under the Natural Gas Act, which necessarily depends on the choice of whether a § 4(e) or a § 5(a) hearing is to be held, is deeply-rooted in the legislative evolution of the Natural Gas Act, as well as other major regulatory statutes providing for similar hearing procedures.[11] Under the original Interstate Commerce Act of 1887 (which, as amended, served as the model for the Natural Gas Act), a carrier did not bear the burden of proving that its proposed new rates were just and reasonable, and it could establish new rates simply by filing a schedule of the new rates with the ICC and by furnishing copies of the schedule to its

[10] FPC v. Texaco Inc., 417 U.S. 380, 389 (1974); American Smelting and Ref. Co. v. FPC, 494 F.2d 925, 940-41 (D.C. Cir.), *cert. denied,* Southern California Gas Co. v. FPC, 419 U.S. 882 (1974); State Corp. Comm'n. of Kansas v. FPC, 206 F.2d 690, 713 (8th Cir. 1953), *cert. denied,* 346 U.S. 922, *rehearing denied,* 347 U.S. 1002 (1954).

[11] These statutes are listed at page 16 of the text, *infra.*

freight offices.[12] Although carriers had a duty under the statute to charge only "just and reasonable" rates, the remedy available to consumers assessed unreasonable rates was limited to a suit at common law for damages.[13] In 1906, the ICC was empowered by the Hepburn Act[14] to determine the justness and reasonableness of rates already in effect under what is now § 15(1) of the Interstate Commerce Act,[15] the analogue of § 5(a) of the Natural Gas Act. In 1910, the Mann-Elkins Act[16] empowered the ICC to hold hearings on proposed new rates under what is now § 15(7) of the Interstate Commerce Act,[17] which is the analogue of § 4(e) of the Natural Gas Act. In a hearing held under § 15(7), the ICC was fully empowered to suspend proposed rates, to order refunds, and to hold hearings prior to the time that proposed new rates went into effect. Moreover, for the first time, the burden to prove the justness and reasonableness of a proposed new rate increase was imposed on the carrier.[18] More recently, with the passage of the Administrative Procedure Act in 1946, Congress made it clear that, as a general rule,

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[12] Texas & Pac. Ry. Co. v. Cisco Oil Mill, 204 U.S. 449 (1907).

[13] Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

[14] 34 Stat. 589.

[15] 49 U.S.C. § 15(1) (1959).

[16] 36 Stat. 552.

[17] 49 U.S.C. § 15(7) (1959).

[18] 36 Stat. 552. In 1940, the burden of proof provision in § 15(7) was amended to its present form to impose the burden of proof on the carrier with respect to any change in rate, fare, charge, classification, rule, regulation, or practice. 54 Stat. 912; 49 U.S.C. § 15(7) (1959).

the proponent of change in administrative proceedings should bear the burden of proof.[19]

Consequently, twenty-three years after passage of the original Interstate Commerce Act, Congress firmly established the fundamental proposition that the regulated entity should bear the burden of demonstrating the justness and reasonableness of its tariff proposals. As noted, this fundamental legislative decision has been repeatedly reaffirmed in the major regulatory acts modeled after the Interstate Commerce Act and in the Administrative Procedure Act. Congress has undoubtedly recognized that consumers—the persons to be protected by these regulatory acts—would find it unduly burdensome, if not virtually impossible, to prove that a tariff proposed by a regulated entity is unjust and unreasonable. In matters depending for their resolution upon substantial and detailed technical data, virtually all of which is in the custody and possession of the regulated entity, even the most diligent consumer effort to challenge a proposal by a regulated entity will have difficulty succeeding. Only if the burden of proof is placed on the regulated entity proposing a change are the odds made somewhat even.

For example, if a pipeline company proposed under § 4(d) to double its rates, an effective challenge to the proposal would require extensive knowledge of the pipeline's markets as well as its operations. As guardian of consumer interests, the Commission must not be permitted to shackle consumers in their effort to counter the pipeline's proposal by employing the novel procedure utilized in this case: (1) permit the pro-

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[19] Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d) (1967), originally enacted in 1946, reads:

> (d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. . . .

posal to go into effect over consumer protests filed under § 4(e), without first holding hearings under § 4(e) in which the pipeline would bear the burden of proof; (2) refuse to suspend the effectiveness of the proposal or to provide for refunds; and (3) after the new tariff has gone into effect, treat the protests as complaints filed under § 5(a) and order hearings to be held under § 5(a), thereby imposing the burden of proof on the complainants and rendering the Commission powerless to grant retroactive relief at a later date should the consumers ultimately prevail in their effort to prove the tariff unjust and unreasonable.

2. Whenever a Formal Complaint Is Lodged with the Commission under § 4(e) Raising Serious Questions Regarding the Justness and Reasonableness of a Proposed Tariff Change Filed by a Pipeline under § 4(d), the Commission Is Required To Conduct a Full Hearing under § 4(e) on the Proposal and To Hold the Pipeline to Its Burden of Proof in § 4(e).

If a pipeline proposes a tariff change under § 4 of the Natural Gas Act, and no complaint is lodged questioning the justness and reasonableness of the proposal, the Commission may accept the proposal and permit it to go into effect without hearings.[20]

In this proceeding, however, several of Transwestern's customers timely filed formal complaints under § 4(e) prior to the issuance of the Commission's Orders under review, in which they raised serious questions regarding the justness and reasonableness of Transwestern's proposal. The filing of these complaints—so long as they were not frivolous—clearly triggered the requirement in § 4(e), as well as the general rule in § 7(c) of the Administrative Procedure Act, that the pipeline meet its burden of proving the justness and reasonableness of its proposal. In addition, § 4(a) of the Natural Gas Act requires that all tariffs must be "just and reasonable." The Commission's acceptance of a proposed tariff change under 4(e), coupled with a refusal to order hearings under § 4(e) in the face of complaints filed under § 4(e) urging such hearings, necessarily implies that the accepted tariff is in fact just and reasonable. Since § 19(b) of the Natural Gas Act explicitly requires the Commission to act on the basis of substantial evidence,[21] and since the Commission's Orders are final orders terminating the § 4 proceeding commenced by Transwestern's filing, the filing of the complaints by Transwestern's customers imposed upon the Commission the duty to ensure that its Orders were supported by substantial record evidence and thus precluded the Commission from effectuating Transwestern's proposal without also holding hearings under § 4(e).

Judicial precedent makes it clear that the Commission has no discretion to take summary action under § 4 of the Natural Gas Act, except in *pro forma* matters. It is well-settled that the Commission, over the complaint of a party filed under § 4(e), has no power summarily to accept a proposed new rate filed by a pipeline company under § 4(d) without first examining the complaint to determine whether it is frivolous.[22] It is also well-settled that the Commission may not summar-

[20] Pennsylvania Gas and Water Co. v. FPC, 463 F.2d 1242, 1251 (D.C. Cir. 1972); Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125, 1128 (D.C. Cir. 1969).

[21] 15 U.S.C. § 717r(b) (1970).

[22] United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956); FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1956); Shell Oil Co. v. FPC, 334 F.2d 1002, 1007 (3d Cir. 1964); Natural Gas Pipeline Co. v. FPC, 253 F.2d 3, 7 (3d Cir.), *cert. denied*, Dorchester Corp. v. Natural Gas Pipeline Co., 357 U.S. 927 (1958).

ily reject a proposal filed under § 4(d) if the filing complies with the requirements of the Commission's rules regarding the form of § 4 filings and the filing is not void on its face.[23] General Motors submits that, in view of these precedents, the Commission was powerless to ignore the complaints of Transwestern's customers (which the Commission did *not* find to be frivolous) and to accept summarily Transwestern's proposed new tariff, without ordering hearings under § 4(e) in order to evaluate the complaints in the light of substantial record evidence as required by § 19(b).

In the instant case, the Commission acted wholly without any evidence—much less substantial evidence—when it summarily accepted Transwestern's proposed tariff change over the protests of Transwestern's customers. This is necessarily the case, since no hearings previously had been held, and since the Commission scheduled hearings under § 5(a) only *after* the new plan went into effect. It should go without saying that the Commission cannot even begin to fill this evidentiary void with its Order 467-B,[24] since, as the Court of Appeals below[25] and the Petitioners here[26] have noted, Order 467-B is a mere policy statement having no binding substantive effect.

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[23] Municipal Light Bds., etc., Mass. v. FPC, 450 F.2d 1341, 1346 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 989 (1972); Mississippi River Fuel Corp. v. FPC, 202 F.2d 899, 901-902 (3d Cir.), *cert. dismissed,* 345 U.S. 988 (1953).

[24] Order No. 467-B, *supra,* note 7.

[25] Pacific Lighting Serv. Co. et al. v. FPC, — F.2d —, Nos. 73-2538 et al. (9th Cir. April 25, 1975) slip op. at 2.

[26] Petition of Pacific Lighting et al. at 15-16; Petition of the State of California et al. at 13.

3. The Opinion of the Court of Appeals, if Not Reversed by This Court, Will Have a Substantially Detrimental Impact on the Effectiveness of the Protection Afforded to Consumers by the Natural Gas Act, as Well as Similar Statutes, and Will Cause Serious Practical Problems in the Case at Bar.

If Petitioners prevail before this Court, the practical impact on Transwestern will be unnoticeable. It is not the position of Petitioners, nor is it the position of Respondent, General Motors, that the Commission should have *suspended* the effectiveness of Transwestern's proposed curtailment plan pending hearings on its lawfulness. Rather, the Commission should have held hearings under § 4(e) instead of under § 5(a). Thus, if Petitioners prevail, Transwestern would not be placed in the position of being without an effective curtailment plan when curtailments are necessary due to gas supply shortages.

However, the impact of the Ninth Circuit's decision will be quite substantial for Transwestern's customers. As noted by this Court on numerous occasions, the primary purpose of the Natural Gas Act is to protect consumers from unjust and unreasonable tariffs.[27] On a most rudimentary level, the fact that the Commission accepted Transwestern's proposed curtailment plan on a final basis, rather than pending § 4(e) hearings, over timely consumer protests and in the absence of any evidence, presents a major threat to the procedural safeguards provided in the Natural Gas Act for the protection of gas consumers. Indeed, this case

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[27] *E.g.,* FPC v. Tennessee Gas Transmission Co., 371 U.S. 145, 154 (1962); FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 19 (1961); Atlantic Ref. Co. v. Public Serv. Comm'n of N.Y. (CATCO), 360 U.S. 378, 388 (1959); Panhandle E. Pipe Line Co. v. Public Serv. Comm'n, 332 U.S. 507, 520 (1947); FPC v. Hope Natural Gas Co., 320 U.S. 591, 610 (1944).

presents no less a question than whether natural gas consumers have for their protection the law of the Natural Gas Act or merely the discretion of the Federal Power Commission.

To illustrate the inadequacy of the novel procedure utilized in this case, assume that the FPC issues a policy statement suggesting that, in order to assist the urban poor, all pipelines immediately should file rates providing a 50% discount to distributors serving cities with populations exceeding 500,000. All pipelines immediately respond (as Transwestern did in this case to Order No. 467-B) by filing proposed new tariffs under § 4(d) containing the suggested discount. The Commission is deluged with consumer protests filed under § 4(e). Nevertheless, the Commission accepts the proposed tariffs under § 4(e) without first providing for hearings, suspension, or refunds. After the rates go into effect, the Commission issues a further order in which it declares that the complaints filed under § 4(e) will be treated as having been filed under § 5(a), and it proffers the complaining consumers a § 5(a) hearing, thus making it very clear that they will bear the burden of proving the new rates unjust and unreasonable. Under such circumstances, can it reasonably be said that the Commission has adequately discharged its statutory duty to protect the public interest? Certainly the complaining consumers would say no. More importantly, who is to say, without substantial evidence, that the 50% discount will have the intended effect of benefitting the urban poor? Who is to say, without substantial evidence, that the urban poor should receive a benefit not made available to the rural or small-town poor? Yet, this plainly inadequate summary procedure is identical to the procedure utilized in this case.

The practical consequences for Transwestern's customers arising from this novel procedure are evident. As noted, shortly following the issuance of the Commission's Orders in this case, Order 467-B, upon which Transwestern felt obliged to model its proposed curtailment plan and which is the only alleged support for its plan, was held by the United States Court of Appeals for the District of Columbia Circuit to have no substantive effect.[28] One of the fundamental concepts of Order 467-B—the distinction between so-called "firm" service and so-called "interruptible" service—has been repudiated by the District of Columbia Circuit [29] as well as the Fifth Circuit [30] in the cases that so far have reached the courts of appeals to review the Commission's application of Order 467-B in adjudicatory proceedings looking toward the prescription of permanent pipeline curtailment plans. Thus, one of the major aspects of the Commission's preferred curtailment plan (Order 467-B) has thus far failed to withstand judicial scrutiny. Yet, the Ninth Circuit here would shift to consumers purchasing on an "interruptible" basis the burden of demonstrating that the "firm"-"interruptible" dichotomy of Order 467-B (as reflected in Transwestern's curtailment plan), as well as other significant aspects of the Order 467-B priorities, are unjust and unreasonable. The Commission's procedural legerdemain, through which it effectuated Transwestern's Order 467-B curtailment plan intact on a final basis, without ordering a § 4(e) hearing, should not be condoned where the economic stakes, in terms

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[28] Pacific Gas and Elec. Co. v. FPC, 506 F.2d 33, 40-44 (D.C. Cir. 1974).

[29] Arkansas Power & Light Co. v. FPC, — F.2d —, Nos. 73-1637 et al. (D.C. Cir. August 21, 1975) slip op. at 1638-39. *See also,* Consolidated Edison Co. of N.Y. v. FPC, 511 F.2d 372, 379-80 (D.C. Cir. 1974).

[30] State of La. v. FPC, 503 F.2d 844, 872 (5th Cir. 1974).

of jobs and the relative prosperity of substantial regions of the nation, could be so high.[31]

The Ninth Circuit's decision also raises serious questions regarding the effectiveness of other regulatory statutes that, like the Natural Gas Act, contain hearing procedures modeled after those first enacted by Congress for the Interstate Commerce Act and presently embodied as § 15(1) and §15(7) of that Act.[32] The other principal statutes of this type are: the Federal Aviation Act,[33] the Communications Act of 1934,[34] the Federal Power Act,[35] the Freight Forwarders Act,[36] the Motor Carrier Act,[37] and the Water Carrier Act.[38] Under all of these statutes, the decision of the Court of Appeals necessarily raises this question: whether a regulatory commission empowered to act under one of these statutes may summarily accept and make effective on a final basis not pending hearings a tariff change proposed by a regulated company where no evidence exists to support the proposed change and where the consumers that these statutes were enacted to protect raise serious questions regarding the lawful-

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[31] The practical importance of the assignment of the burden of proof in administrative proceedings was eloquently expressed by Judge Leventhal in his dissenting opinion (on an unrelated issue) in *Cities of Canton, Cleveland, and Massillon* v. *FPC*, 360 F.2d 521, 527 (D.C. Cir. 1966) as follows:

> [P]rotection of consumers typically lies in diligent attention to procedural requirements, particularly those involving the burden of proof and presentation resting on utilities which seek a change in revenues.

[32] 49 U.S.C. § 15(1), (7) (1959).

[33] 49 U.S.C. § 1482(d), (f), (g), (h) (1963).

[34] 47 U.S.C. §§ 204, 205 (1962).

[35] 16 U.S.C. §§ 824d(e), 824e(a) (1974).

[36] 49 U.S.C. § 1006(b), (e) (1963).

[37] 49 U.S.C. §§ 316(f), (g); 318(b), (c) (1963).

[38] 49 U.S.C. § 907(d)-(i) (1963).

ness of the proposed change. If the Ninth Circuit's opinion that the Federal Power Commission, under such circumstances, may refuse to require the regulated company proposing the tariff change to observe its burden to prove the change just and reasonable in a hearing initiated prior to the effectiveness of the new tariff and may assign the burden of proof to the complainants in a hearing initiated after the effectiveness of the new tariff, then necessarily the same principle will apply in proceedings before other regulatory commissions.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondent, General Motors Corporation, respectfully requests that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered on April 25, 1975, in *Pacific Lighting Service Company et al.* v. *FPC*, —— F.2d ——, Nos. 73-2538 et al.

Respectfully submitted,

EDWARD J. GRENIER, JR.
RICHARD P. NOLAND
FLOYD I. ROBINSON

SUTHERLAND, ASBILL & BRENNAN
1666 K Street, N.W.
Washington, D.C. 20006

Attorneys for General Motors Corporation

Of Counsel:

FRAZER F. HILDER
General Counsel

WILLIAM A. VAUGHAN
GENERAL MOTORS CORPORATION
3044 West Grand Boulevard
Detroit, Michigan 48202

September 26, 1975

Supreme Court, U. S
FILED
NOV 13 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-350

PACIFIC LIGHTING SERVICE COMPANY AND SOUTHERN CALIFORNIA GAS COMPANY,

No. 75-359

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS AND FOR RESPONDENT GENERAL MOTORS CORPORATION IN REPLY TO BRIEF FOR RESPONDENT FEDERAL POWER COMMISSION

K. R. EDSALL
720 West 8th Street
Los Angeles, California 90017
General Counsel for Petitioner, Southern California Gas Company

Of Counsel for Petitioners, Pacific Lighting Service Company and Southern California Gas Company:
THOMAS D. CLARKE, *Attorney*

RICHARD D. GRAVELLE
J. CALVIN SIMPSON
JAMES S. ROOD
5066 State Building
San Francisco, California 94102
Attorneys for Petitioners, the People of the State of California and the Public Utilities Commission of the State of California

EDWARD J. GRENIER, JR.
RICHARD P. NOLAND
FLOYD I. ROBINSON
SUTHERLAND, ASBILL & BRENNAN
1666 K Street, N.W.
Washington, D.C. 20006
Attorneys for Respondent, General Motors Corporation

Of Counsel for Respondent, General Motors Corporation:

FRAZER F. HILDER
General Counsel

WILLIAM A. VAUGHAN
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202

NOVEMBER 13, 1975

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Petitioners, Pacific Lighting Service Company and Southern California Gas Company ("Pacific Lighting et al.") and the People of the State of California and the Public Utilities Commission of the State of California ("California et al."), and Respondent, General Motors Corporation, ("General Motors"), through their Counsel, hereby file their Brief in reply to the Brief for Respondent, Federal Power Commission ("Commission") in Opposition.

The Commission, in its Brief, has stated several times [1] that it is the position of Petitioners that the Commission, inter alia, was required to order hearings under Section 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e) (1970), *before* permitting the new curtailment plan proposed by Transwestern Pipeline Company to become effective. This characterization completely misconstrues the issue raised by Petitioners.

Such an argument by Petitioners would be tantamount to contending that the Commission should have *suspended* the effectiveness of the proposed curtailment plan pending the actual commencement and completion of Section 4 hearings. However, Petitioners have stated clearly that they are not objecting to the exercise of the Commission's suspension powers in this case, since the duty to hold Section 4(e) hearings does not depend on the exercise of the suspension power in Section 4(e).[2] Instead, Petitioners are contending only that the Commission was required to hold hearings under Section 4(e), in which the proponents of the proposed curtailment plan would bear the burden of proof, rather than under Section 5(a), in which the opponents of the plan would bear the burden of proof. Using this procedure, as clearly noted by Petitioners,[3] the Commission could permit the plan to go into effect without any suspension but pending the outcome of Section 4(e) hearings and subject to any modifications found necessary based on the proponents' failure to

[1] See Brief for the Commission in Opposition at 4, 5, 6 and 9.

[2] Petition of Pacific Lighting et al. at 24; Petition of California et al. at 11-12. See also Brief for Respondent, General Motors, in Support at 2, n.1, and 13.

[3] Petition of Pacific Lighting et al. at 24; Petition of California et al. at 11-12. See also Brief for Respondent, General Motors, in Support at 5-6, 13.

sustain their burden of proof on the record ultimately compiled in such hearings.

Respectfully submitted,

K. R. EDSALL
720 West 8th Street
Los Angeles, California 90017
General Counsel for Petitioner, Southern California Gas Company

Of Counsel for Petitioners, Pacific Lighting Service Company and Southern California Gas Company:
THOMAS D. CLARKE, *Attorney*

RICHARD D. GRAVELLE
J. CALVIN SIMPSON
JAMES S. ROOD
5066 State Building
San Francisco, California 94102
Attorneys for Petitioners, the People of the State of California and the Public Utilities Commission of the State of California

EDWARD J. GRENIER, JR.
RICHARD P. NOLAND
FLOYD I. ROBINSON
SUTHERLAND, ASBILL & BRENNAN
1666 K Street, N.W.
Washington, D.C. 20006
Attorneys for Respondent, General Motors Corporation

Of Counsel for Respondent, General Motors Corporation:

FRAZER F. HILDER
General Counsel

WILLIAM A. VAUGHAN
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202

November 13, 1975